Cypress Lawn Cemetery Association *and* Cemetery and Greens Attendants Union Local 265, affiliated with Service Employees International Union, AFL–CIO *and* Cemetery and Greens Attendants Union Local 265, affiliated with Service Employees International Union, AFL–CIO; Building Service Employees Pension Trust; Building Service Health and Welfare Trust. Cases 20–CA–20739, 20–CA–22063, and 20–CA–22350

October 31, 1990

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On April 12, 1990, Administrative Law Judge Joan Wieder issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.[3]

[1] The Respondent asserts that the judge's resolution of credibility, findings of fact, and conclusions of law are the results of bias. After a careful examination of the entire record we are satisfied that this allegation is without merit.

Furthermore, it is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In affirming the judge's conclusion that the Respondent violated Sec. 8(a)(5) by unilaterally implementing its New Operations Plan in September 1986, we find it unnecessary to rely on the judge's discussion of deferral to an arbitration award pursuant to the principles of *Olin Corp.*, 268 NLRB 735 (1984), and *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). The parties have stipulated that they do not want deferral to that award in resolving the unfair labor practice issues in this case.

We find no merit in the Respondent's argument in exceptions that it did not violate Sec. 8(a)(5) by implementing the New Operations Plan because it acted pursuant to an alleged ''sound and arguable basis'' for interpreting the broad management-rights clause in the parties' contract as permitting this unilateral change. The Respondent relies on *NCR Corp.*, 271 NLRB 1212 (1984), in support of this argument. For the reasons fully set forth in *Johnson-Bateman Co.*, 295 NLRB 180 (1989), we find *NCR* inapposite. The judge's findings in this case fully disclose that, as in *Johnson-Bateman*, there is no contractual provision specifically addressing the subject matter of the Respondent's changes and susceptible of two equally plausible interpretations, the Respondent's unilateral action was not based on a substantial claim of contractual privilege, and the dispute here is not solely one of contract interpretation.

We find it unnecessary to rely on the judge's quotation of a summary of the Board's analysis of bad-faith surface bargaining issues in *United Technologies Corp.*, 296 NLRB 571 (1989). This analysis is not applicable to the determination of whether the Respondent's unilateral changes, without any prior notice to or bargaining with the Union, violated Sec. 8(a)(5).

Finally, we affirm the judge's conclusion that the Respondent's assistant superintendents were supervisors within the meaning of Sec. 2(11) of the Act when they coercively solicited employees to sign decertification petitions in June 1988. The record is unclear whether the assistant superintendents were also bargaining unit members at that time. If they were not, their coercive conduct is attributable to the Respondent based solely on their statutory supervisory status. If they were, we agree with the judge's finding that their coercive conduct is attributable to the Respondent under the test set forth in *Montgomery Ward & Co.*, 115 NLRB 645 (1956).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cypress Lawn Cemetery Association, Colma, California, it officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[3] The Respondent shall reimburse employees for out-of-pocket losses resulting from its failure to make contractual benefit funds payments. See *Kraft Plumbing & Heating*, 252 NLRB 891 (1980). The computation of backpay due as a consequence of the Respondent's unlawful unilateral changes shall be made as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), rather than as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). Finally, we shall substitute a new notice with provisions paralleling those in the judge's recommended Order.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT urge, encourage, and solicit our employees to file a petition to decertify the Union, and/or coercively solicit our employees' signatures.

WE WILL NOT withdraw recognition from or refuse to bargain collectively with Cemetery and Greens Attendants Union Local 265, affiliated with Service Employees International Union, AFL–CIO as the representative of our employees in the appropriate unit described as follows:

> All employees covered under the terms of the March 1, 1985 to February 29, 1988, collective-bargaining agreement between Associated Cemeteries and the Union.

WE WILL NOT refuse to apply the collective-bargaining agreement and unilaterally implement changes, terms, and conditions of employment, including: unilaterally implementing the New Operations Plan, failing to maintain a dental benefit plan, failing to contribute to the Union's health and welfare plans, failing to contribute to the Union's pension trust, establishing a

safety committee, changing the grievance procedure, granting a cost-of-living allowance and base pay adjustment, establishing individual performance bonus, changing the sick leave accumulation policy, establishing for each employee life insurance in the amount of $50,000 granting education leaves, tuition payments, and cash awards for suggestions, but we will not rescind any benefits we have already instituted.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above-described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL make whole employees represented by the Union in the described unit by paying on their behalf all health and welfare, pension, and dental funds, which have not been paid and which would have been paid absent our unilateral discontinuance of such payments, and continue such payments until such time as we negotiated in good faith to new agreement or to an impasse.

WE WILL, on request, restore the status quo ante to the implementation of the New Operations Plan, and make the bargaining unit employees, described above, whole, with interest, for any losses or expenses they may have incurred as a result of our unlawful unilateral changes in their terms and conditions of employment.

CYPRESS LAWN CEMETERY ASSOCIATION

Boren Chertkov, Esq., for the General Counsel.
Ned A. Fine, Esq. (Fisher & Phillips), of San Francisco, California, for the Respondent.
W. Daniel Boone. Esq. (VanBourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOAN WIEDER, Administrative Law Judge. These cases were tried in San Francisco, California, on various days in September and November 1989.[1] The charge in Case 20–CA–20739 was timely filed on November 7, 1986, by Cemetery and Greens Attendants Union Local 265, affiliated with Service Employees International Union, AFL–CIO (the Union or Charging Party). The charge in Case 20–CA–22350 was timely filed on December 5, 1988, by the Union and Building Service Employees Pension Trust (the Pension Trust) and the Building Service Health and Welfare Trust (the H & W Trust). The charge in Case 20–CA–22063 was timely filed on July 8, 1988, by the Union and a complaint was issued on August 22, 1988. This complaint was consolidated with the other cases by order dated March 31, 1989. The consolidated complaint alleges that Cypress Lawn Cemetery Association (Respondent or Company) violated Section 8(a)(1) and (5) of the National Labor Relations Act.

The complaint in Case 20–CA–22063 specifically alleges Respondent violated Section 8(a)(1) of the Act by soliciting employees to withdraw from the Union. This complaint also alleges Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union and then unilaterally implementing new terms and conditions of employment. The consolidated complaint in Cases 20–CA–20739 and 20–CA–22350 alleges Respondent violated Section 8(a)(5) and (1) of the Act by implementing what it called a New Operations Plan without bargaining with the Union and ceased making contributions to various health and welfare and pension trust funds without bargaining with the Union.

The Respondent, in its answer to the complaint, as amended, conceded, inter alia, that it meets one of the Board's jurisdictional standards,[2] but denies committing any unfair labor practices.

On the entire record, including my observation of the witnesses, and after careful consideration of the posttrial briefs filed by counsel for General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

Respondent is a nonprofit California corporation engaged in the operation of a cemetery in Colma, California. Respondent and the Union have a long-term collective-bargaining relationship.[3] The last agreement was negotiated with a multiemployer association, Associated Cemeteries, and was effective through February 1988. In late 1987, Respondent withdrew from the multiemployer association and, until June 1987, bargained with the Union independently. Respondent also informed the Union it would be represented by Industrial Employers and Distributors Association, by letter dated December 23, 1987. There was no testimony concerning the involvement of Industrial Employers and Distributors Association in any contract negotiations with the Union.

In May 1985, Respondent appointed a new general manager, Tony Kingstone-Hunt. During some of the time here pertinent, particularly in June 1988, Serafin Mora was assistant general manager,[4] but he did not handle any labor relations matters at this time. Subsequently, Mora succeeded

[1] All dates are in 1989 unless otherwise stated.

[2] Based on this admission, I find Respondent is an employer within the meaning of Sec. 2(2) of the Act, engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act.

[3] Respondent admits and I find the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Sec. 9(b) of the Act:

> All employees covered under the terms of the March 1, 1985, to February 29, 1988, collective-bargaining agreement between the Associated Cemeteries and the Union.

[4] Unless otherwise indicated, all references to Kingstone-Hunt are to Tony Kingstone-Hunt, and all references to Mora are to Serafin Mora.

Kingstone-Hunt as Respondent's general manager.[5] In September 1985, Kingstone-Hunt promoted Tom Torvik to the position of assistant superintendent, and directed Torvik to compile a list of all the tasks performed by each employee in the unit.

Based on Torvik's study, Kingstone-Hunt developed a ''New Operations Plan'' which changed the jobs previously performed by the employees in the Union, and distributed the plan to the employees on or about July 29, 1986. The plan was implemented in September 1986, without prior notice to the Union. The Union filed a grievance and the matter was arbitrated. On June 20, 1988, the arbitrator, Charles A. Askin, issued his decision.

The parties have stipulated they do not want deferral to the Askin decision and further stipulated the arbitration record would be considered the instant proceeding to permit full consideration of the unfair labor practice charges in Cases 20–CA–20739 and 20–CA–22350. The parties also stipulated Respondent made unilateral changes after June 30, 1988, as alleged in paragraphs 10 and 12 of the consolidated complaint in Cases 20–CA–20739 and 20–CA–22350 and paragraphs 13 and 15 of the complaint in Case 20–CA–22063, without bargaining with the Union.

B. *Implementation of the New Operations Plan*

On or about February 5, 1986, T. Kingstone-Hunt sent a memorandum to all union employees announcing a meeting to discuss ''work conditions, job responsibilities, operations and plans and the future etc.'' The memorandum also indicated how impending plans would affect the employees' future and security. The meeting notice declared ''it is essential that nobody be absent'' and ''we must have 100% attendance.'' T. Kingstone-Hunt requested the union steward, Tony Ferrari, assist him in setting up the meeting.

Mark Pence, the Union's secretary-treasurer, saw the meeting announcement on or about February 5, 1986, and told the Union's part-time business agent, Michael Brusin,[6] to contact Kingstone-Hunt, to inform him the Union was very upset about what appeared to him in an attempt to negotiate ''some kind of plan with the—members'' and to inform Kingstone-Hunt it was the Union's responsibility to negotiate with the employer.

Ferrari gave the Union a copy of the memorandum and talked to Kingstone-Hunt about setting up the meeting, but he was unsuccessful in meeting Kingstone-Hunt's requirements. Ferrari, while talking with Kingstone-Hunt, requested the presence of a Union representative at the employee meeting. Kingstone-Hunt replied absolutely not and if Ferrari attended the meeting, it would be only as an employee, not as union steward.

Pence spoke to Kingstone-Hunt who told him: ''that he would implement any plan that he wanted to, that it was his property, that he would just do whatever he wanted to and that he didn't have to bargain with the union.''

According to Ferrari's uncontroverted testimony, after the issuance of the meeting announcement, there were rumors circulating among the employees, including some employees would be reassigned without regard to seniority, that the reassignments might result in employees doing jobs they did not like or were not used to. On July 29, 1986, in response to the rumors, Kingstone-Hunt circulated a memorandum to all employees stating, as here pertinent:

> Most of you are by now aware that management has for several months been developing a New Operations Plan.
>
> The details of this new operating procedure have not been made available to you because all the details have not been finalized and because we have been undergoing certain changes in the administrative staff which needed to be addressed first. . . .
>
> The new plan is designed to permit each employee to identify with and be more proud of his contribution. It will do much to ensure job security while preparing us for the changes that are coming as we approach the time when Cypress is filled to capacity. And it will make a more even distribution of work load and enable us all to claim once again that Cypress Lawn is the most beautiful cemetery.

Pence was given a copy of this missive and instructed the business agent, Del Gaudio, to confer with Kingstone-Hunt to inform him he needed to negotiate with the Union. Pence also telephoned Kingstone-Hunt on or about August 4, 1986. Kingstone-Hunt informed Pence: ''that he was going to implement any plan that he wanted to, that it was his property and he—he was going to do what he wanted to, that he didn't need to bargain with the union over this.''

On or about September 2, 1986, Pence was given a copy of the New Operations Plan by Del Gaudio. The plan had been distributed to the employees. The New Operations Plan begins with the statement:

> The manner in which Cypress Lawn Memorial Park has heretofore assigned workers and scheduled their tasks has been unscientific and somewhat haphazard and has resulted in unfair distribution of work so that some men have been required to perform relatively 'hard labor' on a more or less continuous basis throughout the work day while others have had tasks which required little exertion.

The statement then recognizes that ''absolutely equal distribution of work is impossible.''

Concerning Respondent's collective-bargaining obligation, the New Operations Plan opines:

> Certainly nothing in the contractual negotiations with the union and in the resulting agreements has ever been intended to suggest that seniority preferences related to quantity of work but to type of work or assignment. ''Where merit and ability are approximately equal, seniority shall govern.'' refers to the employee's request to be assigned to a ''job.'' Job creation is the responsibility and the right of management. In this regard, it should be clearly understood that the term ''job'' refers to any grouping of ''tasks'' which in the view of man-

[5] The parties stipulated Kingstone-Hunt was arrested and convicted of child molestation, a felony, shortly after he testified in the arbitration proceeding. S. Mora then became Respondent's general manager.

[6] On or about June 3, 1986, Brusin resigned his position, and after a hiatus until August, Pence hired Carolyn Del Gaudio as the Union's part-time business agent. Brusin had been the business agent from about February 1986 until his resignation in June 1986. Pence acted as business agent during this hiatus. Del Gaudio has left Respondent's employ and she did not testify at the unfair labor practice hearing but did testify at the arbitration proceeding.

agement combine to require an average of 8 hours of work per day.

The plan created three ''divisions,'' each headed by a foreman, as follows: human remains disposition—George Erasmy, foreman; buildings maintenance—Jack Sala, foreman; and, grounds maintenance—Guillermo Mora, foreman. The duties of the foreman, according to the New Operations Plan, are as ''Working-Foremen, not administrators. They will work with their crews performing equal tasks to achieve the desired results within the necessary time frame.'' The plan also foresees the need to ''cross-over'' in tasks but sees each division ''dependent upon itself.''

Concerning job assignments, the plan provided:

> The Union agreement states that Seniority should govern in job assignments when merit and ability are approximately equal. This new Work Plan, therefor, starts by presenting the Divisions to the workers. Each employee will thus be given the opportunity to apply for his preferred Division. Through the Foremen, each employee will have an opportunity to request his preferred ''job'' within that Division. It will be noted that virtually no ''jobs'' in the new Divisions are the same as what are considered ''jobs'' under the current system.
>
> When each employee has made known, in writing, to the Foremen, his personal preference for a specific ''job,'' management will allocate jobs based on the following criteria: First—Merit and Ability; Second—Seniority; Third—Preference.

The plan assigns 7 men to Sala's crew, 5 men to Erasmy's crew, and 12 men to Mora's crew. The specific duties of each crew are detailed. It is uncontroverted Respondent implemented the New Operations Plan without informing the Union and negotiating about such implementation. Kingstone-Hunt gave a copy of the New Operations Plan to every employee.

Pence instructed Del Guadio to file a grievance with Kingstone-Hunt. Before the grievance was filed, Pence telephoned Kingstone-Hunt and according to Pence's uncontroverted testimony:

> I told Mr. Hunt that this—this operation plan was, you know, I felt was—was absurd and unfair, that there—that he had never attempted ever to negotiate with the union at all, that he just went ahead and, you know, did what he wanted to, that I felt that, you know, we needed, you know, to negotiate this.
>
> And frankly what he told me is that if we attempted to arbitrate this or if we won an arbitration, that he would go nonunion. He said that there would be no way that the union was going to tell him what to do, that it was his property and he was going to run it the way he saw fit.

Pence informed Kingstone-Hunt during this conversation that he was concerned about Respondent not bargaining with the Union and assigning workers unfamiliar tasks for which they had not been trained which could increase their risk of termination. He also related his concern that the change could result in an employee being assigned a much more difficult task for which he would not receive equitable compensation. Another care was the apparent disregard of the contract's seniority provisions.

Pence made several telephonic demands on Kingstone-Hunt to negotiate with the Union about the New Operations Plan and according to Pence:

> Mr. Hunt's responses to everything was that it, you know, that it's his property and he's going to run it the way he wanted to and the union is not going to tell him how to—how to operate his property, that, you know, that he felt that he didn't need to negotiate with the union. That's always been his—his response to everything.

Kingstone-Hunt also told Pence on another occasion he would not bargain with the Union over the New Operations Plan, ''the union is not going to dictate to him about his cemetery.''

Respondent argues that the business agents, Brusin and Del Guadio, engaged in written correspondence with Kingstone-Hunt about many matters and it was inconsistent for Pence to communicate one or more demands to bargain about the New Operations Plan verbally only, in contrast to what appears to be the practice of establishing a paper trail of union demands. I find this argument unpersuasive.

Kingstone-Hunt admitted Del Gaudio discussed the New Operations Plan with him and said her comments could be termed a demand to bargain, although he would not so term her statements. Del Gaudio testified at the arbitration hearing that during a telephone call on or about September 15, 1986, she informed Kingstone-Hunt:

> I felt that he could not unilaterally implement such a plan as one that reorganized the entire work force at the cemetery. That it was my opinion that he would need to bargain with the union prior to its implementation.

According to Del Gaudio, Kingstone-Hunt replied in a manner similar to his response to Pence, he said he had the total right to implement such a plan, he would not allow the Union and its employees to run the cemetery. Kingstone-Hunt admitted having many conversations with Del Gaudio about the New Operations Plan and management's right to structure the jobs and decide what work is to be done and by whom. He also admitted at the arbitration hearing that he would not let the Union dictate; he would run the cemetery in the way he wanted.[7]

When Ferrari was requested by Kingstone-Hunt to arrange an employee meeting concerning the New Operations Plan, he refused Ferrari's request for a union representative to attend the meeting, and said he was going ahead with it wheth-

[7] According to Del Gaudio, Kingstone-Hunt also said, during this conversation, ''that, if necessary, he would take a strike and fire scabs and accept resignations from the employees,'' indicating that no matter what the Union did, the New Operations Plan would remain in effect. These threatening comments do not appear unusual. I credit Ferrari's uncontroverted testimony that Kingstone-Hunt informed him he would fire the last 10 men hired if an employee meeting did not occur. Ferrari, who testified in an open and honest manner, also said Kingstone-Hunt was ''always threatening people with layoffs or firing or suspensions. . . . He called employees radicals and terrorists and threatened to fire several employees because they were bitchers.'' I credit his testimony.

er the Union liked it or not, and if Ferrari had any quarrels with it to file a grievance.

Pence, the Union's chief elected officer who hired business agents and oversaw the Union's financial affairs as well as holding a full-time position as a cemetery worker, demonstrated he had very little time to conduct all the Union's affairs and no staff to assist him. He therefore took expedient ways of conducting union business. There was no evidence refuting his claimed practice of taking the most expedient route to conducting union business. Pence testified in an open and honest manner, he appeared to attempt to fully respond to the questions, seeming more plausible and convincing, and I credit his testimony. I therefore find that the Union made several demands on Respondent to bargain about the proposed and thence implementation of the New Operations Plan.[8]

By letter dated October 1, 1986, Del Gaudio filed a grievance concerning the New Operations Plan. The letter provides:

> Specifically, we are concerned that several of the new job assignments consolidate tasks which were previously being performed by two people, under one job heading. Thus, your plan requires one person to perform a specified amount of work which before was being done by two or more employees. In effect, this undercuts the wage scale which was negotiated by the parties to the Contract and which is set out in Section 9.
>
> Therefore, pursuant to Section 20(A) of the Contract, this constitutes written notice to you that your New Operations Plan is in violation of the wage scale set out in Section 9 of the Contract.

The Union was also concerned the New Operations Plan altered other terms and conditions of employment.

The grievance was considered at a board of adjustment and, according to Ferrari, Kingstone-Hunt again stated he was going to operate the cemetery in the manner he wanted and was not prepared to bargain with the Union over any part of the New Operations Plan.

The grievance went to arbitration and hearings were conducted on September 30, December 8 and 9, 1987, and January 26, 1988. The statutory issues raised by unfair labor practice charges related to the subject matter of the arbitration were specifically excluded from consideration by the arbitrator. Consolidated with the New Operations Plan grievance was the grievance of the reassignment of Remo Castiglioni under the New Operations Plan. The parties stipulated the arbitration record into the instant unfair labor practice proceeding and agreed that the arbitration record, four transcripts and accompanying exhibits, be considered by me in determining the merits of the consolidated complaints. By opinion and award dated June 20, 1988, the arbitrator, Charles A. Askins, found:

> 1. The Employer violated the agreement in its implementation of the New Operations Plan.
>
> 2. The Employer shall rescind the New Operations Plan and reinstate the job classification system which was in effect in September, 1986.
>
> 3. The Arbitrator retains jurisdiction of the remedy portion of this Award and any dispute with [respect] thereto.

After implementation of the New Operations Plan, Pence also instructed Del Gaudio to circulate a petition among the employees which read: ''would you prefer working under job reassignment plan or working under past job conditions.'' Of about 22 permanent employees, 18 signed under the column entitled ''past'' and none signed under the column entitled ''new.''

Discussion

It is well established an employer violates Section 8(a)(5) and derivatively (1) of the Act by unilaterally changing the terms and conditions of employment of its employees without first providing their collective-bargaining representative a meaningful opportunity to bargain about those changes. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Borg Warner Corp.*, 356 U.S. 342 (1958). The parties do not contest the changes made by the implementation of the New Operations Plan if the changes are mandatory subjects of bargaining. For example, the plan provided for bonuses, which is a mandatory subject of bargaining, see *Singer Mfg. Co.*, 24 NLRB 444 (1940), modified on other grounds and enfd. 119 F.2d 131 (7th Cir. 1941), and its progeny;[9] workloads and work standards, *Woodside Cotton Mills Co.*, 21 NLRB 42 (1940); subcontracting pursuant to the plan, where, as here, Respondent indicated a purpose for implementation of the New Operations Plan was to reduce labor costs,[10] and there was no evidence of a reduction in revenues or a significant change in the nature or direction of the enterprise. *Timken Roller Bearing Co.*, 70 NLRB 500 (1946), enf. denied on other grounds 161 F.2d 949 (6th Cir. 1947); *Brown Co.*, 278 NLRB 783 (1986); *G. Heileman Brewing Co.*, 290 NLRB 991 (1989); and, terms of employees' transfers to other positions, *Kansas National Education Assn.*, 275 NLRB 638 (1985);[11] discipline, *NLRB v. Bachelder*, 120 F.2d 574 (7th Cir. 1941); *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986).

Respondent argues the implementation of the New Operations Plan was not an unlawful unilateral change in terms

[8] The Respondent and Union stipulated during the arbitration proceeding that if the Union made a demand to bargain about the New Operations Plan it would have been refused by the Employer. It was further agreed the Employer's position is that it had no obligation to consult with, give notice to, or bargain with the Union about implementation of the plan.

[9] I find the creation of paid vacations to Hawaii and comparable locals, with spending money, under the New Operations Plan, is compensation for services, as a reward for good work, and as such are wages, not a gift; therefore it is a mandatory subject of bargaining. *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965). These bonuses amount to a significant economic benefit to individual employees and the New Operations Plan declared it was a benefit that would be available as a condition of employment. *Getty Refining Co.*, 279 NLRB 924, 924 (1986). This is a condition of employment Respondent must bargain with the Union about.

[10] Kingstone-Hunt testified at the arbitration proceeding that the New Operations Plan was implemented with a view to reducing labor costs by reducing staffing from 24 to 18 within 5 years.

[11] The Board held, at 639:

> Initially we note that mandatory subjects of bargaining are those which set a term or condition of employment or regulate the relation between the employer and the employee. [*Latex Industries*, 252 NLRB 855, 857 (1980)] We thus find that the terms of an employee's transfer clearly affect employment conditions and are a mandatory subject of bargaining. It is well settled that a union has a statutory right to be consulted about a change affecting the terms and conditions of employment.

and conditions of employment requiring bargaining because it was contractually permissible. First, Respondent asserts there is a broad management-rights clause permitting the reassignment of tasks under the New Operations Plan. Next, it asserts any restrictions in the contract upon management rights is limited to subcontracting under Section 3(B) of the collective-bargaining agreement.[12]

The management-rights clause of the collective-bargaining agreement provides:

> The parties hereto have a mutual interest in securing efficient business operations, and desire to cooperate to that end. It is the duty and right of the Employer to manage the business and direct the working forces subject to the conditions herein set forth. This includes the right to hire, transfer, promote, layoff, and discharge for proper cause provided that this will not be for the purpose of discrimination against employees, and is subject to the Grievance Procedure provided in Section 20.

Section 3(B) of the agreement provides:

> Employees shall perform any and all work customarily performed by them in and about Employers' properties in accordance with past practices, and such work shall be in the exclusive jurisdiction of the Union. The use of particular types of mechanical equipment presently operated by members of the Union in performing such work shall remain in the exclusive jurisdiction of the Union.

Respondent argues section 3(B) of the agreement refers only to subcontracting. There was no clear and convincing testimony establishing a contractual restriction of the application of this section to subcontracting. Further, there was no legal basis for imposing such a restriction. After the arbitration award, the Union agreed with one multiemployer association to modify this section of the contract to restrict its application to subcontracting. Accordingly, I conclude the record fails to warrant the interpretive restriction sought by Respondent.

General Counsel did not deem deferral appropriate and issued the complaint but argues Respondent should not prevail on the theory the management-rights clause permitted unilateral implementation of the New Operations Plan without bargaining for the issue is one of contract interpretation which was parallel to the issue effectively resolved by the arbitrator. Since Respondent does not contend the arbitration proceedings were unfair or irregular or any party did not agree to be bound by the award, as the award is not clearly repugnant to the Act, General Counsel, however, urges the contractual issue is effectively resolved and deference is required. Citing *Dennison National Co.*, 296 NLRB (1989).

At the commencement of the arbitration proceeding, the Union requested and Respondent specifically refused to agree to presentation to the arbitrator of the issue of whether there was a violation of Section 8(a)(5) of the Act by their implementation of the New Operations Plan; Respondent agreed only to arbitration within the parameters of the collective-bargaining agreement; which is interpretation and application of provisions of the agreement. In *Olin Corp.*, 268 NLRB 573 (1984), the Board set forth the criteria for Board deferral to arbitration awards as follows:

> We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is ''clearly repugnant'' to the Act. And, with regard to the inquiry into the ''clearly repugnant'' standard we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is ''palpably wrong,'' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.
>
> Finally, we would require that the party seeking to have the Board reject deferral and consider the merits of a given case show that the above standards have not been met. Thus, the party seeking to have the Board ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.

I conclude Respondent has failed to affirmatively demonstrate the defects in the arbitral process or award. I conclude the contractual issue resolved by the arbitrator was factually parallel to the unfair labor practice issue concerning the New Operations Plan. *Columbia University*, 279 NLRB 130 (1986); *Badger Meter*, 272 NLRB 824 (1984). At the most, Respondent would have me second-guess the arbitrator concerning the meaning of a paragraph of contract. I find the arbitrator's interpretation not clearly repugnant to the purposes of the Act. *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). I also find the arbitrator's decision is not ''palpably wrong.'' As noted above, the evidence that the contract was modified after the arbitration decision to reflect limitation of the terms of section 3(B) of the agreement to subcontracting, in the absence of any evidence warranting interpreting the contract to contain such a limitation absent such modification, supports the arbitrator's decision, and warrants my making the same finding. *International Harvester Co.*, 138 NLRB 923, 929 (1962), affd. sub nom. *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964), cert. denied 377 U.S. 1003 (1964).

As the Board noted in *Dennison National Co.*, supra:

> In an unfair labor practice proceeding on the merits of the statutory issue, the Board must consider whether the Respondent's action constituted a unilateral change in violation of its bargaining obligation under Section 8(a)(5) of the Act. . . .
>
> The Board's involvement at this postarbitration deferral stage, however, is not in the nature of an appeal

[12] The arbitrator determined the New Operations Plan, as unilaterally implemented, violated the agreement because sec. 3(B) of the agreement requires that the work customarily performed by employees be performed in accordance with past practices. . . . This dispute does not involve an asserted employee right to resist any job assignment. The Union protests management's decision to abolish virtually all of the existing jobs and implement new classifications in the face of the contractual language that work customarily performed by employees shall be done in accordance with past practices.

> by trial de novo. It is not necessary that the cases have been presented to the arbitrator the way the General Counsel might have presented it with the benefit of hindsight. Moreover, notwithstanding that the arbitrator's award may not be totally consistent with Board precedent, deferral is appropriate unless . . . [shown] that the award is not susceptible to an interpretation consistent with the Act.

Inasmuch as Respondent has withdrawn recognition from the Union, rendering the arbitration proceeding ineffective as a means of redress, and the unilateral change which was the subject of the arbitration is asserted to be, and is found, to be an unfair labor practice, I conclude judicial enforcement is not the only means of redress warranting dismissal of this complaint. In this respect the doctrine of *Spielberg*, supra, and *Malrite of Wisconsin*, 198 NLRB 241 (1972), are not applicable. See *Autoprod, Inc.*, 265 NLRB 331 (1982). I also note this unlawful action preceded Respondent's withdrawal of recognition of the Union as the employees' collective-bargaining representative.

Since the parties stipulated there would be no deferral to the arbitration decision, deference is not appropriate under *Spielberg*, supra, I conclude the management-rights clause in the collective-bargaining agreement did not authorize Respondent to unilaterally implement the New Operations Plan. One reason the management-rights clause does not save Respondent harmless is, many of the unilateral changes implemented by Respondent under the New Operations Plan did not relate to the management rights specified in the collective-bargaining agreement. The general right to ''manage the business and direct the working forces'' is not the requisite clear and unmistakable waiver. *Metropolitan Edison v. NLRB*, 460 U.S. 693 (1983); *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964); *Technicolor Government Service v. NLRB*, 739 F.2d 323, 327 (8th Cir. 1984); *A-1 Fire Protection*, 273 NLRB 964 (1984). ''National labor policy disfavors waiver of statutory rights by a union and thus a union's intention to waive a right must be clear before a waiver can succeed.'' *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). The broad general phrase ''manage the business and direct the working forces,'' in the absence of any evidence of bargaining history, fails to demonstrate the requisite ''clear and unmistakable waiver.''

Similarly, the provision in the management-rights clause granting the employer the ''right to hire, transfer, promote, lay off and discharge for proper cause,'' does not grant the employer the right to unilaterally change any and all existing terms and conditions of employment. *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985). The seniority provisions of section 5, the temporary workers provisions of section 6, the wage section of section 9, the benefit plans, other provisions relating to terms and conditions of employment contained in the collective-bargaining agreement, and established practices for transferring employees based primarily on seniority, have not been superseded by the management-rights clause.

The majority of employees testifying in the arbitration proceeding claimed, without refutation from Kingstone-Hunt or line management, that they received their job assignments based on seniority, not merit and ability. They further testified their assignments under the New Operations Plan were not based on seniority. Section 5 of the collective-bargaining agreement provides, as here pertinent:

> A. Where merit and ability are approximately equal, seniority shall govern in all cases of promotion or job assignment. In cases of layoff and rehire, seniority shall be the only rule.

These same employees also testified at the arbitration proceeding, after their initial assignments when they were hired, subsequent assignments were made after they were asked if they wanted the transfer and they were the most senior employees willing to accept the position. The only exception to this testimony was German Lopez who clearly believed management prior to Kingstone-Hunt did not like him and operated by favoritism. He admitted Kingstone-Hunt favored him and he was given positions by Kingstone-Hunt based on favoritism. I do not credit his testimony, which was singularly opposed to all the other employee witnesses and because of his admitted bias toward Kingstone-Hunt and his style of management.

On the other hand, I had the opportunity to observe Pellegrino Perone, and he appeared to be attempting to answer all questions fully and honestly. I therefore credit his corroborated testimony that Respondent, prior to implementation of the New Operations Plan, made job assignments and transfers based on seniority after consulting with the affected employees concerning their wishes. I also credit the unrefuted testimony of employees at the arbitration proceeding that their new jobs under the plan were so designed that they could not perform all the assigned duties.

I find the management-rights clause does not constitute a waiver of the Union's right to bargain about terms and conditions of employment. The management-rights clause cannot be construed as a waiver of the Union's right to bargain for there was no evidence such massive restructuring of job assignments without regard to seniority was ever discussed in contract negotiations and there is no evidence of a past practice of union acquiescence in the Respondent's unilateral implementation of the New Operations Plan or similar changes.

There was some evidence another signatory to the collective-bargaining agreement, Holy Cross cemetery, made changes in assignments of its bargaining unit employees during 1983 to 1985, but these changes were subsequently discussed with the Union and those employees who protested their job assignments were reassigned.

The Board stated the general principles of waiver of statutory rights in *Johnson-Bateman Co.*, 295 NLRB 180, 184–185 (1989), as follows:

> It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable. [*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)]. Accordingly, the Board had repeatedly held that generally worded management-rights clauses or ''zipper'' clauses will not be construed as waivers of statutory bargaining rights. [*Suffolk Child Development Center*, supra at 1350; *Kansas National Education Assn.*, 275 NLRB 638, 639 (1985). Cf. *Rockford Manor Care Facility*, 279 NLRB 1170 (1986).] In *Suffolk Child Development Center*, for example, the Board

> found that the management-rights clause did not constitute a waiver by the union of its right to bargain about changes in medical benefits, because there was not specific reference in that clause to employee medical benefits or other terms of employment. Likewise, in *Kansas National Education Assn.*, supra at 639, the Board found that language in the management-rights clause reserving to management ''the right to carry out the ordinary and customary functions of management and adopt policies . . . and practices in furtherance thereof'' did not constitute a waiver by the union of its right to bargain about employee transfer arrangements. More specifically, the Board found ''[t]he provision is at best vague and as such insufficient to meet the standard of a 'clear and unmistakable waiver.'''
>
> Waiver of a statutory right may be evidenced by bargaining history, but the Board requires the matter at issue to have been fully discussed and consciously explored during negotiations and the union to have consciously yielded or clearly and unmistakably waived its interest in the matter. [*Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982).]

In the instant case, there was no evidence adduced concerning the bargaining history of the management-rights clause, no less a clear showing the Union ''consciously yielded or clearly and unmistakably waived its interest in the matter.'' Id.

Analogously, the Board held in *Angelus Block Co.*, 250 NLRB 868, 877 (1980):

> A zipper clause must meet the standard of any other alleged waiver. It is well established that in order to establish waiver of the statutory right to bargain in regard to mandatory subjects of bargaining, such as is involved here, there must be a clear and unequivocal relinquishment of such right. Even where a zipper clause is couched in broad terms, it must appear from an evaluation of the negotiations that the particular matter in issue was fully discussed or consciously explored and the union consciously yielded or clearly and unmistakably waived its interest in the matter. This is particularly true where, as here, an employer relies on the zipper clause to establish its freedom to unilaterally change, or institute new, terms and conditions of employment not contained in the contract.

Assuming *arguendo*, there was evidence during negotiations the management-rights clause was ''fully discussed or consciously explored,'' Respondent failed to follow long-established procedure of asking employees if they wanted a transfer to a different position and making such transfers based on seniority. Under the New Operations Plan more permit men were hired than allowed in the collective-bargaining agreement, and the temporary employee provisions were not followed. Kingstone-Hunt admitted in the New Operations Plan, past practices would not be followed.

Also, the New Operations Plan instituted additional rewards such as time off with pay and mentioned the hope to develop a bonus system. Some employees have subsequently been granted the time off and been given paid days off and vacations in addition to the contractually mandated benefits, such as a company paid trip to Hawaii, with spending money. A new disciplinary tool, referred to as report cards, was instituted. Jobs such as road sweeping and rodent control were performed, to some extent, by outside contractors, rather than by the employees, who performed them prior to the implementation of the New Operations Plan. The crematory jobs were combined. In fact some jobs, like Perrone's, which had been dedicated to the maintenance of the sprinkler system, were eliminated. Respondent failed to adduce any evidence these changes and employee transfers were based on merit and ability or were otherwise in accord with the provisions of the collective-bargaining agreement.

I find these changes in terms and conditions are mandatory subjects of bargaining and were material, substantial, and significant. As previously noted, some jobs, such as sprinkler man and mower, were virtually eliminated and the job of section man was a new position. The addition of the report cards to the disciplinary system is also a material, substantial, and significant change requiring bargaining. *Rust Craft Broadcasting of New York*, 225 NLRB 327 (1976); *Murphy Diesel Co.*, 184 NLRB 757, 763 (1970).

In sum, I find there was no clear and unmistakable waiver by the Union of any collective-bargaining rights for there was no evidence the matter was ever discussed during negotiations. If there was such a discussion, some of the terms and conditions of employment not encompassed in the management-rights clause were unilaterally modified by Respondent when it implemented the New Operations Plan. Based on these and subsequent findings, I conclude Respondent unlawfully implemented these changes without affording the Union an opportunity to bargain, and there was no impasse or consent given by the Union. Respondent's conduct constitutes a violation of Section 8(a)(5) and (1) of the Act. *Marriot Corp.*, 258 NLRB 755, (1981), enfd. 759 F.2d 1441 (2d Cir. 1983), cert. denied 464 U.S. 829 (1983).

Respondent also argues the Union failed to demand to bargain. I find this claim to be without merit. In *Al Landers Dump Truck*, 192 NLRB 207, 208 (1971), the Board stated:

> The Board and the courts have repeatedly held that a valid request to bargain need not be made in any particular form, or in haec verba, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hour, and other terms and conditions of employment. [Accord: *Marysville Travelodge*, 233 NLRB 527 (1977); *Trucking Water Air Corp.*, 276 NLRB 1401 (1985); *RTW Industries*, 296 NLRB 910 (1989).]

I find the Union by Pence and Del Gaudio, demanded to discuss what they perceived as changes in the terms and conditions of employment of all the unit employees occasioned by the implementation of the New Operations Plan. Kingstone-Hunt admitted replying he could do whatever he wanted in job assignments; demonstrating he understood the demand to bargain but believed he had no obligation to negotiate over the New Operations Plan. Accordingly, I find Del Gaudio's and Pence's statements to be demands to bargain with the Union as the appropriate representatives of the employees affected by the New Operations Plan. Such demands further indicate there was no waiver by the Union of their right to negotiate on behalf of the employees they represent concerning the New Operations Plan.

As the Board found in *United Technologies Corp.*, 296 NLRB 571 (1989):

> In determining whether a party has bargained in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place. *Hotel Roanoke*, 293 NLRB 182 (1989); *Port Plastics*, 279 NLRB 362, 382 (1986); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). The Board examines not only the parties' behavior at the bargaining table, but also conduct away from the table that may affect the negotiations. *Hotel Roanoke*, above; *Port Plastics*, above. Among other indicia that a party has bargained in bad faith, the Board also considers whether a party has engaged in delaying tactics and whether a party has made unilateral changes in mandatory subjects of bargaining. *Atlanta Hilton & Tower*, above.

Kingstone-Hunt implemented the New Operations Plan admittedly without first providing the Union any opportunity to bargain about these changes. As previously indicated, these were material and substantial changes in the terms and conditions of employment. I, therefore, conclude Respondent has bargained in bad faith in violation of Section 8(a)(5) and (1) of the Act by unilaterally implementing the New Operations Plan.

C. *Withdrawal of Recognition*

Respondent withdrew recognition from the Union on June 28, 1988, shortly after the arbitration decision issued. Respondent contends this withdrawal is appropriate based on employee petitions raising a good-faith doubt the Union represented a majority of the employees in the unit. General Counsel asserts the record does not establish Respondent had a reasonable good faith belief the Union no longer represented a majority of the employees. Initially, General Counsel asserts recognition was withdrawn in the face of unremedied unfair labor practices, i.e, the unilateral implementation of the New Operations Plan in violation of Sections 8(a)(5) and (1) and 8(d) of the Act and its promotion of the circulation of decertification petition, including the involvement of supervisors in the soliciting of signatures.

1. Status of assistant superintendents as supervisors and/or agents

General Counsel contends Respondent's three assistant superintendents solicited signatures for the decertification petition. Thus, it must be initially resolved whether George Erasmy, Guillermo (Willie) Mora, and Jack Sala were supervisors within the meaning of Section 2(11) of the Act and/or agents of Respondent within the meaning of Sections 2(2) and 2(13) of the Act. Respondent denies they or any other supervisors and agents were involved in soliciting signatures for the decertification petition.

Under Section 2(11) of the Act, a supervisor is defined as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any one of these powers is sufficient to confer supervisory status on the individual having such authority. *NLRB v. Edward G. Budd Mfg. Co.*, 169 F.2d 571, 576 (6th Cir. 1948), cert. denied 335 U.S. 908 (1949); *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1948), cert. denied 338 U.S. 899 (1949).

An agent within the meaning of Section 2(2) and (13) of the Act is defined in *American Door Co.*, 181 NLRB 37, 41, (1970), as an employee who, under all the circumstances, the other employees could reasonably believe was reflecting company policy, and speaking and acting for management.

In a notice to all employees, dated September 10, 1985, entitled ''Employment Opportunities,'' Respondent announced: ''We are currently considering a new management position in the administration: Assistant Superintendent. . . . This is a nonunion position.'' Prior to filling these positions, Respondent, on August 11, 1986, issued a memo to all employees appointing ''Workforce Divisions Foremen. Sala was designated foreman buildings and structures division, Mora, foreman grounds maintenance division, and Erasmy, foreman of the interments division. This memo assigned the employees to one of these three units and indicated the foremen positions are to be working positions.[13] This memorandum also stated: ''The Foremen will, in the coming weeks and months, arrange all positions to insure that each man has as much individual control over his own efforts as possible. . . . The choosing of the individuals for each posted position will be made by the Foremen themselves, as a group, in consultation with the superintendent.''

On December 12, 1986, Kingstone-Hunt issued a notice to all employees as follows:

> In order to achieve more effective management of the general operations, we have created a new management position.
>
> We are pleased to announce the promotion to management of the following three employees . . . . George Erasmy—Assistant Superintendent; Guillermo (Willie) Mora—Assistant Superintendent; Jack Sala—Assistant Superintendent.
>
> The Assistant Superintendents will take over their new responsibilities effective December 15, 1986.

Respondent, on December 15, 1986, in a message addressed to all union staff members with the subject the general authority of assistant superintendents, declared:

> Assistant Superintendents will continue to function within their former areas of responsibilities.
>
> However, in the interest of efficiency, each of them is also authorized to issue instructions to or make reports on any Union employee[s].

This statement is similar to that describing the duties of the foremen in the New Operations Plan, however it also clearly gives them the authority to ''issue instructions'' and make disciplinary reports.

[13] The collective-bargaining agreement provides working foremen are considered to be members of the bargaining unit.

The union agent, Del Gaudio, sent Kingstone-Hunt a letter on or about December 18, 1986, stating the three assistant superintendents were promoted to management positions and are not currently members of the bargaining unit, hence ''they will no longer be able to perform work which is in the exclusive jurisdiction of the union employees.'' When Pence received a copy of Del Gaudio's letter he called Kingstone-Hunt and:

> A. Um—I Asked him if these were—if these were union workers or management personnel? Did they have the right to, to discipline?
>
> And he told me they had the right to discipline and that they weren't bargaining unit employees, that they were management employees, that they weren't going to do any work on the property. . . .
>
> Q. Did you—uh—did he—did you ask him—so you asked him whether or not they were going to do bargaining unit work, is that—uh?
>
> A. That's correct. He told me they were superintendents, that they weren't going to do bargaining unit work, that they, you know, were going to handle management—the management side of labor relations.

Kingstone-Hunt admitted during the arbitration proceeding to referring to the assistant superintendents as management but claimed he never endowed them with supervisory authority.[14] Respondent did not reply to Del Gaudio's December 18, 1986 letter. Kingstone-Hunt did admit assistant superintendents had the power to evaluate the work of employees but claimed only he had the authority to fire employees. The Union filed a grievance because after awhile, the assistant superintendents were doing bargaining unit work on occasion. According to Del Gaudio's testimony at the arbitration proceeding, which was unrefuted, Kingstone-Hunt, in 1986, agreed the assistant superintendents would not do bargaining unit work. In 1987, during a board of adjustment meeting, this grievance was discussed, and Respondent then took the position the assistant superintendents were not supervisors so they could perform bargaining unit work.

Tony Ferrari credibly testified that for awhile, after the memo announcing their appointment was distributed, the three assistant superintendents did not do any bargaining unit work, and gradually thereafter, they began doing some bargaining unit work. Ferrari informed Erasmy he was management and was not supposed to engage in ''union work.'' Erasmy apologized and said ''old habits are hard to break.'' Erasmy did not contradict Ferrari's testimony concerning this conversation. Ferrari similarly informed Sala he should not be doing bargaining unit work. Ferrari prepared a grievance prior to these conversations concerning assistant supervisors performing bargaining unit work.

Steven Rozzi, a current employee who has worked for Respondent about 8 years, corroborated Ferrari's testimony. According to Rozzi, Erasmy:

> handed me a memo listing that Mr. Erasmy and Jack Sala and Willie Mora were now made superintendents. And that they were welcome to management, is what it stated in the memo.
>
> And I told Mr. Erasmy that, ''Well, if you're turning to management and that we're union, you can't do union work.'' And he agreed with that. He goes, ''No, I can not operate the hoe or do any union work anymore.''

Prior to distribution of the memo, Erasmy was the number one backhoe operator on the internment crew. After the memo was distributed, Rozzi became the number one operator of the backhoe on that crew. About 3 months after Erasmy became an assistant superintendent, he began to perform unit work, a factor which led to Ferrari's filing a grievance. Erasmy claimed he continued to work the backhoe ''whenever it was needed, on and off,'' that he never ceased operating the backhoe.

I credit Rozzi's testimony where it conflicts with Erasmy's statements based on the attitude and demeanor of the witnesses. Rozzi appeared more plausible and convincing. Also, Rozzi's testimony was corroborated by Ferrari, both of these witnesses were employed by Respondent in the unit at the time they testified. *Federal Envelope Co.*, 147 NLRB 1030, 1036 (1964), citing *Georgia Rug Mill*, 131 NLRB 1304, 1305 fn. 2 (1961), modified on other grounds 308 F.2d 89 (5th Cir. 1962). Further, there was no refutation of the testimony Rozzi was promoted to the position of number one backhoe operator. If Erasmy continued in his former position, there would have been no need to elevate Rozzi, and have Rick Slyter take Rozzi's backup position.

When the assistant superintendents began performing bargaining unit work, a grievance was filed and Kingstone-Hunt, according to Pence's unrefuted testimony in this proceeding and Del Gaudio's in the arbitration proceeding, during a board of adjustment, Respondent represented the assistant superintendents would not do bargaining unit work. Subsequently, by letter dated June 6, 1987, Respondent sent the Union a letter stating:

> At the time that they were designated assistant superintendents, December 15, 1987, it was anticipated that they would begin to provide much more active leadership than in the past, and as a result, would have little or no time for hands-on work. . . .
>
> Therefore, it is the view of management that they have never ceased to meet the standards for working foremen under the collective bargaining agreement, and continue to do so, and for the purposes of the agreement are working foremen.

This letter further corroborates the testimony that for about 3 months after their appointment as assistant superintendents, Sala, Erasmy, and Mora did not engage in bargaining unit work.

I conclude Respondent held the assistant superintendents out as supervisors, not working foremen. In addition to the

[14] Kingstone-Hunt claimed only he could hire and fire, but this was refuted by Serafin Mora who testified as follows:

> A. The job description for the superintendents states that the superintendent has the authority to hire and fire.
>
> Q. Did Mr. Kingstone-Hunt ever tell you that only he had the authority to hire and fire, in his opinion?
>
> A. No, he did not.

Mora claims he hired employees prior to becoming general manager while Kingstone-Hunt was the general manager and with Kingstone-Hunt's knowledge. Mora independently hired other employees with the knowledge of Kingstone-Hunt and fired at least one employee, Johnson. I credit this testimony of Mora for it is an admission against Respondent's interests.

above referenced communications and memoranda, as late as 1988, Respondent, in a proposed collective-bargaining agreement, had the assistant superintendents handling the first-step grievances. Also, the assistant superintendents attended a management conference,[15] ceased attending union meetings, and Kingstone-Hunt in a letter to Del Gaudio dated March 3, 1987, deleted them from health coverage under the Union's plan. At the bottom of the letter is the note, ''delete, promoted to [management], effective 1/87, George Erasmy, Guillermo Mora, German Lopez, Carmelo Sala, and Serafin Mora.'' It is unknown who made the note, but the individuals ostensibly promoted were not listed as employees for whom Respondent has been making contributions into the Union's health insurance plan. These representations were made prior to and during the time the decertification petitions were circulated. The assistant superintendents were included on the management vacation list for the initial period following their appointments to that position.

Respondent argues the assistant superintendents were not supervisors; they did not possess one of the powers specified in Section 2(11) of the Act. General Counsel claims the assistant superintendents performed the duties of supervisors and enjoyed management benefits. The initial area of dispute is whether assistant superintendents can hire and fire employees.

According to Rozzi, whom I have found to be a credible witness, Erasmy told him, in the presence of Slyter, while criticizing their work and in response to Rozzi's question what he could do about it, replied he could hire and fire. Slyter,[16] in corroboration, testified Erasmy said; ''I can hire and fire him.'' According to Cotroneo, Sala helped him get his job. Sala admitted he could recommend hiring.[17] Respondent's payroll records apparently reflect this ability for they include Jack Sala's cousin, Joe Sala, brother-in-law, Di Santi, and, his son, John Sala.[18] Serafin Mora's brother, Willie Mora, works for Respondent as do his cousins Hector Gonzalez and Ernesto Moreno. In further corroboration, Perrone testified Erasmy ''told me that he had the power to hire. He could have fired me or whatever.'' Based on the credited testimony of current employees Rozzi, Slyter, and Perrone, the employment list and Sala's admission, I find the assistant superintendents could effectively recommend individuals to be hired.

I also find the assistant superintendents displayed the authority to discipline and effectively recommend discipline of employees. Rozzi was given a disciplinary warning dated July 1, 1987, signed by German Lopez as superintendent and George Erasmy as assistant superintendent. The warning indicates if Rozzi did not alter his bad driving habits he would be transferred to another position. Erasmy handed Rozzi the warning and Rozzi discussed it with him at that time and for the next few days.

As part of the recordkeeping that could result in discipline, the assistant superintendents filled out weekly performance evaluations which they and the employees called ''report cards.'' These report cards were part of the employees' personnel files and rated employees in more than 30 categories of job performance. The report cards were in use from August 1987 until June 3, 1988, when they were discontinued. The performance evaluations contained on the report cards were used in an award system. According to Sala, if an employee was rated as a very good worker, he got an award, such as a trip to Hawaii. On June 16, 1988, employee Michael Jimenez received the fourth performance award, ''an all expense paid trip to Hawaii or some other place of his choosing at the same cost and an additional week of paid vacation.''

Sala[19] also testified he believed consistently bad ''report cards'' could lead to the recipient being disciplined, including termination, because: ''Well, I mean, you see those thing is like a report card. If the report card is good, you go to the next class. If the report is bad, you go back to next class.'' The employees knew the assistant superintendents were filling out ''report cards,'' and the assistant superintendents gave each employee in their unit a copy of the completed document. Slyter found the ''report cards'' an ''extreme'' cause for concern for on occasion they contained negative statements.

Moreover, Ferrari, in unrefuted testimony, stated Jack Sala told him ''that he had saved Pino from losing his job because they were going to fire him for getting into an argument with George Erasmy. And he said he saved Pino Perrone's job, that he had done him a favor.'' Sala admitted that he asked Kingstone-Hunt to discipline his son, Tom Kingstone-Hunt, and thereafter his son was given a reprimand and suspended based on this discussion.[20] I conclude the credited evidence establishes the assistant superintendents can effectively recommend discipline.

Sala initially testified his buildings and maintenance crew, in particular the janitors, ''automatically know what they are going to do.'' He does not do much janitorial work, only on occasion. The work of the other employees on his crew is routine. Concerning a special project called the sun garden, Sala ''direct[s] the work. . . . Make[s] sure it's done right'' by following an engineer's diagram. He estimates about 50 percent of his weekly worktime is spent directing the sun garden project if there are not many funerals. Ever since his appointment as an assistant superintendent, he has led the families to the burial site, ensuring there was a sufficient number of pallbearers. Depending on the number of funerals, between 10 to 50 percent of his time is spent handling funerals.

Sala also admitted on cross-examination he gave instructions to the internment crew. Rozzi testified Erasmy assigned him his duties each morning, based on the schedule of funerals recorded in a daybook. Erasmy would come and tell him

[15] See *Turnbull Cone Baking Co.*, 271 NLRB 1320 (1984).

[16] I credit Slyter's testimony. He answered in an open and direct manner.

[17] Sala disclaimed having the authority to hire or fire or recommend termination.

[18] John Sala, the son of Assistant Supervisor Sala, was hired on Sala's recommendation. His son started first as a temporary summer employee during school and then he became a full-time employee. John Sala was a student and temporary employee in June 1988.

[19] Sala had been the only working foreman at the cemetery for about 10 years before he was appointed one of the three assistant superintendents.

[20] Sala initially testified he never issued a written warning letter or suspended an employee. On cross-examination he admitted Tom Kingstone-Hunt received a written warning and was suspended based on his conversation with Tony Kingstone-Hunt. This testimony was inconsistent, and indicated a lack of forthrightness and candor which was also visibly noticeable during this witness' testimony. Based on his demeanor, I do not credit Sala's testimony where it is not an admission against Respondent's interests. He appeared elusive and unresponsive and at times inconsistent and implausible. I note this decision is buttressed by the amount of testimony elicited from Sala through the device of leading questions.

if there was a change in assignments or of any ''excess'' work they needed to do that day. Counsel for General Counsel argues the assignment of excess work reveals the assistant superintendents assign other than routine work.

I conclude the evidence fails to show any work assignments are other than routine. The excess work was not described in detail and the evidence does not permit a finding it is other than routine. Giuseppe Sala, Assistant Superintendent Sala's cousin, a 16-year employee, testified he is currently on Mora's crew and his job does not require instructions. Rozzi admitted he could tell from the assignment sheet what he has to do based on his knowledge and 8 years experience. However, Erasmy informed him of the order in which the graves were to be dug that day and the time he had to accomplish each task. Willie Mora told Hector Gonzalez which sections he was assigned and when his assignments changed. He also testified: ''Usually, the foreman tells you, you know, what are you going to be doing.''[21] There was no evidence either Erasmy or the other assistant superintendents were mere conduits for their superiors or that the employees believed that was their role. The employees that testified referred to the assistant superintendents as their ''boss'' or ''supervisor.''

In *Litton Educational Publishing*, 214 NLRB 413, 417 (1974); the Board held:

> It is undisputed that all three leadmen assign and check work and are charged with the responsibility of maintaining an even flow of work. It is also clear that Unbricht informed the employees that the three leadmen were supervisors. The record also reveals that all three transfer employees to other work areas. Although Respondent contends that these transfers occur only with the consent of high management officials . . . there is no evidence that the employees were told that the leadmen were merely conduits for the instructions. Furthermore, it appears that these temporary transfers were instigated by the leadmen, who admittedly had the responsibility to keep the workflow even, and Respondent offered no evidence that any transfer requests by leadmen were ever refused.
>
> The facts herein do not present a typical ''leadman'' situation, which involves a skilled or experienced employee directing the work of lesser skilled employees. Instead the record indicates that [the leadmen] do very little work similar to that performed by other employees, but rather spend almost all their time assigning sorting, checking, and keeping the workflow even.

The New Operations Plan circulated to the employees provided the changes Respondent made, including the appointment of assistant superintendents, was to even out the workflow. The announcements of the New Operations Plan indicated the assistant superintendents were managers.[22] They were placed on the managers' vacation schedule and attended managers' meetings, including a long weekend out of town. Their uniforms were slightly different, their jackets were a superior quality.

Further indicia of the assistant superintendents status as supervisors was their ability to transfer employees from one crew to another for work-related or disciplinary reasons. An August 11, 1986 memo to all employees, while asserting the foremen positions are to be working positions, announced the foremen will make job assignments, ''in consultation with the Superintendent.'' Ferrari testified, without contradiction, that Mora, on numerous occasions, assigned him to help out on another crew headed by either Erasmy or Sala. Rozzi corroborated this testimony when he asserted, convincingly and credibly, that Erasmy threatened to transfer him to another crew because of his ''attitude problems.''[23] Based on the credited evidence, I find the assistant superintendents, at all material times, possessed the authority to transfer employees.

Another indication of supervisory status is the assistant superintendents' authority to grant time off. Sala admitted he had authority to grant employees on his crew a day off. Again without contradiction, Ferrari testified Mora told him he could have time off for doctor's appointments or other personal needs. Ferrari also said the assistant superintendents could reward good workers with days off. Serafin Mora admitted the assistant superintendents had the authority to reward good workers with days off without any apparent approval from one of their superiors after June 28, 1988. Erasmy awarded Slyter a day off with pay under this program. This uncontroverted testimony requires the finding the assistant superintendents had the authority to grant time off to employees. *Tra-Mar Communications*, 265 NLRB 664 (1982).

Additionally, the assistant superintendents would regularly assign Saturday overtime to the same employees, contrary to past practice where overtime was assigned based on seniority and rotation. According to Sala, he needed to get permission to assign overtime but his requests have never been denied. Accordingly, I conclude assistant superintendents could effectively recommend overtime.

Other factors which are indications the assistant superintendents are supervisors as defined in the Act include: Sala has the same pension plan as the office staff, including the admitted supervisors; they are paid more, even though they are required to work longer hours; they also received bonuses of 9 percent of their pay which was not shown to have been awarded to the rank-and-file employees; they were given the use of company trucks with take home privileges when they became assistant superintendents; these trucks used company supplied fuel and were maintained and insured by Respondent; they are supplied business cards identifying them as assistant superintendents; they attend management meetings; and, they wore different uniforms. Also, the employee ratio to supervisors would be inordinately high if the assistant superintendents were not found to be supervisors. *Washington*

[21] Gonzalez appeared to be vacillating and uncertain in any testimony he perceived as unfavorable to his employer. I have not credited his testimony except where it is unfavorable to Respondent. His general demeanor did not appear open and candid.

[22] The New Operations Plan provides, in part: ''some men may wish to change 'jobs' or some Foremen may wish to reassign men based on merit and ability.'' As previously noted, in a September 10, 1985 memo to all employees, Respondent announced: ''We are currently considering a new management position in the administration: Assistant Superintendent.''

[23] Erasmy claimed: ''I told Steve Rozzi at one time that if he didn't like it on the crew, that he could transfer out.'' As previously noted, Erasmy was not a credible witness. His admission Rozzi was told he could transfer to another crew without explaining the mechanism by which this could be accomplished, fails to provide the requisite authenticity to overcome his lack of credibility based on demeanor.

Beef Producers, 264 NLRB 1163 (1982); *Comprehensive Health Planning Council*, 256 NLRB 1191 (1981).

In sum, I find the assistant superintendents can effectively recommend hiring, transfer, use their independent judgment to assign work, independently grant rank-and-file employees rewards such as days off with pay and vacations with pay, discipline other employees or effectively recommend such action, and responsibly direct employees. While their duties of directing other employees do not appear to require the exercise of substantially independent judgment, the assistant superintendents are the individuals responsible for making work assignments and ensuring the work is completed in the appropriate manner and admitted supervisors were not shown to be present in the work areas with sufficient frequency to supervise the rank-and-file employees. The employees believed they were supervisors, as Respondent informed them. I conclude the preponderance of the evidence establishes the assistant superintendents, at all material times, are supervisors within the meaning of the Act, and that Respondent is therefore responsible for certain conduct engaged in by them. *Lawrence Rigging*, 202 NLRB 1094 (1973); *Pearson Bros. Co.*, 199 NLRB 1179 (1972).

I further find that under all the circumstances, the employees could reasonably believe the assistant superintendents were reflecting company policy, and speaking and acting for management when they were associated with the decertification petitions. Not only did Respondent hold the assistant superintendents out as supervisors, the assistant superintendents told various employees they could hire and fire and otherwise affect the terms and conditions of their employment. Accordingly, I conclude the assistant superintendents were agents as defined in Section 2(13) of the Act. *American Door Co.*, 181 NLRB 37, 42 (1970); *Aircraft Plating Co.*, 213 NLRB 664 (1974).

2. The decertification petitions

Pence testified that after the arbitrator's decision issued June 20, 1988, on the New Operations Plan, he telephoned Kingstone-Hunt and said:

> I told—you know—told him that we had just won the—the arbitration decision. I wanted him to go back to the operations at the cemetery that—the way they were before he implemented this—this new system.
>
> And, he told me that if he, you know, if he had to implement—I mean, go back to the old way that he ran the cemetery—that he would go nonunion and there would be no union at all.
>
> It'd be all over, that there was nothing for him to talk about. If we proceeded with this, that there would be no more union.

I find Pence's testimony credible based on attitude and demeanor, he appeared believable and convincing; he testified in a direct manner with no indication of dissembling. The statement there would be no more Union is consistent with other statements Kingstone-Hunt made to Pence previously that if the Union won the arbitration he would go nonunion. As previously noted, Kingstone-Hunt admitted during the arbitration, he said to several employees ''he would not let the union dictate; he would run the cemetery in the way he wanted.''

A week to 9 days after this conversation the Union received a telegram from Kingstone-Hunt dated June 28, 1988, withdrawing recognition of the Union.[24]

Kingstone-Hunt's action was predicated on two petitions circulated by Michael Jimenez and Hector Gonzalez, a cousin of Serafin Mora. General Counsel claims Kingstone-Hunt, Serafin Mora, Erasmy, Willie Mora, and Sala were directly involved in the decertification petitioning effort, thereby violating Section 8(a)(1) of the Act. Respondent disclaims any wrongdoing and asserts the petitions suffice to form a reasonable doubt of the Union's majority status.

The legal standard in considering the defense of a good-faith doubt of continued union majority was stated in *Hospital Employees District 1199P v. NLRB*, 864 F.2d 1096, 1101–1102 (3d Cir. 1989), as follows:

> A union chosen by an appropriate bargaining unit is presumed to have the continued support of the majority of its members. See *Fall River Dyeing*, 107 S.Ct. at 2233; *NLRB v. Burns International Security Service, Inc.*, 406 U.S. 272, 279 n. 3 (1972). . . . The purpose behind this presumption is to promote stability in the collective-bargaining relationship and hence industrial peace. See *Fall River Dyeing*, 107 S.Ct. at 2233. ''Where an employer remains the same, a Board certification carries with it an almost conclusive presumption that the majority representative status of the union continues for a reasonable time, usually a year. After this period, there is a rebuttable presumption on majority representation.'' *Burns*, 406 U.S. at 279 n. 3 (citations omitted). After the initial year, the question of whether the presumption of majority support has been rebutted is recast in terms of whether the employer ''has reasonable, good faith grounds for believing that the union has lost its majority status'' after a collective bargaining agreement has expired. *International Association of Bridge, Structural & Ornamental Iron Workers, Local 3 v. NLRB*, 843 F.2d 770, 772 (3d Cir. 1988), cert. denied, 109 S.Ct. 222 (1988).
>
> In order to show good faith doubt, the employer must produce evidence probative of a change in employee sentiment. This is a difficult burden to meet. For example, the fact that an employee has crossed a picket line is not evidence that the employee has abandoned the union, *NLRB v. Frick Co.*, 423 F.2d 1327, 1333–34 (3d Cir. 1970). Similarly, we have declined to accept testimony proffered by an employer's representative based on his subjective conclusions about change in sentiment. *Toltec Metals, Inc. v. NLRB*, 490 F.2d 1122, 1125 (3d Cir. 1974). In sum, for an employer ''[t]o meet this burden 'requires more than an employer's mere mention of [i]ts good faith doubt and more than proof of the employer's subjective frame of mind.' What is required is a 'rational basis in fact.''' *Toltec*, 490 F.2d at 1125 (bracketed statement in original) (quoting *NLRB v. Risk Equipment Co.*, 407 F.2d

[24] The telegram provides, as here pertinent:

> I have just been advised that an overwhelming majority of the employees of Cypress Lawn in the present bargaining unit have stated their desire to no longer be represented by Local 265. The Association is therefore withdrawing recognition effective immediately. I have advised IEDA of this action and instructed them to cancel the bargaining session scheduled for June 30.

1098, 1101 (4th Cir. 1969)); see also *Frick*, 423 F.2d at 1331.

Another criterion to the professing of a good-faith doubt of the Union's majority status is that this claim must be raised in a context free of illegal antiunion activities or conduct by the employer ''aimed at causing disaffection from the union.'' *Celanese Corp. of America*, 95 NLRB 664, 673 (1951). I have already found that in September 1986, Respondent unlawfully unilaterally implemented the New Operations Plan which materially affected its employees, in violation of Section 8(a)(5) and (1) and Section 8(d) of the Act. There was employee dissatisfaction over the New Operations Plan and the impact its implementation had on their terms and conditions of employment, leading, in part, to the filing of several grievances. As will be seen below, one of the major reasons given by Gonzalez and Jimenez for circulating the petitions were their disaffection caused by their fears the New Operations Plan would be rescinded. The record clearly establishes the basis for employee disaffection toward the Union was caused by the Respondent's unlawful unilateral implementation of the New Operations Plan and the ramifications of a return to the status quo ante its implementation.

The General Counsel asserts the decertification petitions were tainted by the Employer's unlawful participation in the decertification petitions. Respondent claims it did not engage in unfair labor practices that caused employee disaffection with the Union and did not participate in the preparation and circulation of the petitions. Assuming there was no illegal conduct of the nature described above, the validity of the decertification petitions as a basis for creating a good-faith doubt of the Union's majority status is in issue.

a. *The Jimenez petition*

Jimenez is an 8-year employee of Respondent who, in early February 1986 before the announcement of the details and prior to the implementation of the New Operations Plan, was assigned the job of restoring stained glass. Before his assignment as glass curator, Jimenez was a trimmer and then a mower. In 1987, he was offered and accepted an additional job as a security man, for which he received free lodging in a trailer on the cemetery grounds. His trailer was located next to Kingstone-Hunt's. Respondent also has the services of a private security firm. As noted earlier, on June 16, 1988, he was awarded a prepaid vacation to Hawaii or comparable location, shortly before he circulated the petition.

Shortly after he returned from vacation, at the end of the workday on June 26, 1988, Jimenez encountered Serafin Mora. Mora informed him the Union won the arbitration and Respondent would have to return to the ''old plan.'' Mora also said ''they would take me out of my job that I have now and put me back cutting grass.'' Mora then mentioned he was going to speak to Kingstone-Hunt and Jimenez said he would follow him.[25] When Jimenez entered Kingstone-Hunt's trailer, Mora and Kingstone-Hunt were discussing the arbitration award. Jimenez then testified, on cross-examination as follows:

Q. Let's go back again. The first words that were spoken by either of—by you in terms of starting the conversation was, Mr. Kingstone-Hunt, does this arbitration award mean that I have to go back to my outside job, right?

A. Yes.

Q. And his answer was, yes?

A. Yes. . . .

Q. So your question was to him, after finding out from him that as a result of the arbitration award you were going to have to go back to your outside job, you asked him what you could do about it—

A. Yes.

Q. And he told you you could circulate a petition. Is that correct?

A. Yes.

Q. So he was the first one to mention about circulating a petition? Right?

A. Yes.

Q. And he told you that you could circulate a petition in response to your question about how you could keep your job?

A. Yes.

Q. Keep your assignment on stained glass. . . .

A. Well, part of that is, he also mentioned that if you get a majority of that—of the signatures, you can do it.

Q. Okay. He said, if you get a petition with the majority of the signatures saying they want to get rid of the union, then that's something that you can do?

A. Yes.

Q. And that—and those were his words, right?

A. Yes.

Jimenez also admitted he never would have circulated the petition if he had not been led to believe his curator's job would be lost if he did not get rid of the Union. Mora said ''I'd probably have to go back to on the digger.'' When he was in the trailer, Kingstone-Hunt told him the award would affect him, he would go ''back out on the grounds.'' It was not until that conversation with Mora on June 26, 1988, that any mention was made that his job would be affected if the Union won the arbitration. Kingstone-Hunt also informed Jimenez he heard a rumor Hector Gonzalez was circulating such a petition.

I credit Jimenez' testimony only where it was contrary to the interests of his employer or corroborated by another credible witness. He visibly conveyed the impression of a man faced with the problem of possibly hurting his employer and betraying a trust and attempted to present his testimony in a light most favorable to Respondent. He volunteered information when he thought he was protecting his employer and possibly his position. On direct examination he attempted to tailor his testimony to fit what he perceived was most favorable to Respondent. For example, he initially testified he was the one who first raised the possibility of a petition; it was not until cross-examination that he admitted it was Kingstone-Hunt that first raised the possibility of decertification by petition. He also initially claimed, by volunteering the information, that he circulated the petition only during work breaks and lunchtime, and subsequently admitted he obtained some signatures during working time. Another inconsistency in his testimony is: on direct examination he

[25] S. Mora did not deny or refute this testimony of Jimenez. I credit this unrefuted testimony for the reasons stated below.

claimed his curators job was created by the New Operations plan, but during cross-examination he admitted he was appointed to the position which was created by Kingstone-Hunt for him, prior to the implementation of the New Operations Plan. He also admitted the New Operations Plan did not alter his duties. I note Jimenez volunteered information he perceived was helpful to Respondent's case, and at times asserted lack of recall when other matters arising at the same time were recalled with great particularity.

That evening, assertedly only with the help of his wife, Jimenez drafted a petition that stated: ''We employees of Cypress Lawn Cemetery, are signing this petition stating that we no longer want the Union, Local 265, to represent us. We feel you represented the interests of the few and not the majority.'' Jimenez did not claim his wife had any knowledge or expertise in decertification petitions. I do not credit his claim he received no assistance from Respondent in drafting the petition. There is no evidence Jimenez or Gonzales had any knowledge of the petition process. The petition was dated June 27, 1988 and addressed to the Union. Michael Jimenez was the first of nine signatures on the petition.

Jimenez originally claimed he obtained all the signatures on the petition. He then admitted he did not obtain the signature of John Sala, the last signature on the petition. The second signature on the petition is that of Jimenez' brother-in-law, Maximino Jimenez. Maximino Jimenez does not speak fluent English and he does not believe he reads English. The evening of June 26, 1988, Jimenez telephoned his sister and asked her to explain to Maximino that he was going to circulate a petition to get rid of the Union because otherwise he would lose his curator's job. He does not know what his sister told her husband, but Maximino Jimenez signed when he came to work the next day.

The third signature, John Straton, he got at lunchtime, along with numbers four and five, Adrian Warren and Elliot Zuniga, all pallbearers. Jimenez related his situation and they signed. Zuniga mentioned he did not pay dues and Jimenez knew these pallbearers were part-time employees. The clerical staff was not asked to sign the petition because Jimenez knew they were not union members but he did not respond to Straton's comment he did not know if he was ''involved'' with the Union. He next presented the petition to George Erasmy, who signed. Also around lunchtime, Jimenez and Gonzales compared petitions. Later in the afternoon, Sala came to him and said he wanted to sign the petition. With these seven signatures Jimenez was ready to take his petition to Kingstone-Hunt at about 3 p.m. and saw Gonzales who gave him his petition. At the end of the workday, Jimenez took both petitions to the office to give to Kingstone-Hunt, even though his was addressed to the Union. At the end of his workday Jimenez went to the office to give Kingstone-Hunt the petitions when Jack Sala asked him wait, Francisco Cotroneo was coming to the office to sign the petition.

Francisco Cotroneo claims, credibly, that he was forced to sign the petition under duress. Cotroneo testified in Italian, and the resort to interpreters confused the testimony to some extent, however, his demeanor reflected a sincere attempt to relate the facts without embellishment, in an open and forthright manner. Cotroneo testified:

> THE WITNESS: I must explain to you everything that happened with Sala?
>
> Q. All right.
>
> A. Okay.
>
> He came five or six minutes before 5:00. He came to find me—to look for me with a piece of paper. He told me the general manager told me to get you to sign this paper. I told him I will not sign the paper—I won't sign the paper—I want to first talk to my wife. Sala said to me, ''All right.'' I went down—
>
> Q. All right. Let me stop you there. That is the first sequence, I think.
>
> A. Yes, in the columbarium first.
>
> Q. Fine. You did not know what the piece of paper was about in any way, is that correct?
>
> A. No, I did not know. . . . Any paper that they would give me, I would take it home. . . .
>
> Q. Did you take that piece of paper [the petition] home to show your wife before you signed it, Mr. Cotroneo?
>
> A. They didn't give me a chance.

As he was getting ready to go home, he was approached by Erasmy in the parking lot and told to go to the office to see Sala, his assistant superintendent. When he arrived in an office next to Kingstone-Hunt's office, which he referred to as the service room, Sala and Erasmy were there. He was then told to sign the petition. He had no idea what the document said, he cannot read English and does not speak English fluently. He also testified:

> A. When I signed it, no. I was upset, nervous.
>
> Q. When you signed Respondent's l3 [the Jimenez petition] you were nervous?
>
> A. Yes.
>
> Q. Why were you nervous when you were signing Respondent's l3, Mr. Cotroneo?
>
> A. Because you know they told me two or three times to sign.

Cotroneo did not know what he was signing, and after he signed, Sala said it was ''a paper from the Union.'' Cotroneo did not ask for an explanation for he was asked to sign close to where Kingstone-Hunt was located and he could hear Kingstone-Hunt. He said: ''When I went in, I didn't look at anything. I just went and signed. I was very nervous. I was thinking that since the manager was there, I was afraid that maybe I was going to lose my job. I was nervous and I signed it.'' After he signed the petition, Sala took the petition into Kingstone-Hunt and Cotroneo heard Sala inquire if Kingstone-Hunt wished to talk to Cotroneo. It was not until the following morning Cotroneo learned he signed a decertification petition.

Sala admitted he solicited Cotroneo's signature and Cotroneo asked to have his wife review the document. Sala claims he explained the purpose of the petition was to get rid of the Union but acquiesced to Cotroneo's request to have his wife explain the document. Sala claims when he was at the office Cotroneo incidentally appeared to sign the petition. Sala testified he did not say anything to Cotroneo. I do not credit Sala's testimony that he explained the document and just happened on Cotroneo in the office after he signed but did not speak to him. In subsequent testimony Sala admitted he saw Cotroneo sign the petition. Jimenez ad-

mitted he heard Sala speaking to Cotroneo in Italian before Cotroneo signed the petition.

I also do not credit Erasmy's version of the event based principally on his demeanor, which was not forthright. Also his version of the event was implausible. Further, much of Erasmy's direct testimony was elicited through the device of leading questions, even after I warned this could impact on credibility resolutions. He claimed Cotroneo asked him to give him a ride to the office from the garage area so he could sign the petition. He also claimed Cotroneo asked him if the petition ''was good for him.'' Since Erasmy admitted Cotroneo's car was in the garage area and it was after work, he failed to explain why Cotroneo did not drive to the office himself if he was not summoned by Sala. Then he later admitted Cotroneo said Sala wanted him to go to the office. According to Erasmy, who admitted to having difficulty recalling what was said in the office before Cotroneo signed the petition, claimed Jimenez asked if he would like to sign and Sala did not say much. Inasmuch as Erasmy understood Sala summoned Cotroneo to the office, it appears unlikely Sala did not say anything. Jimenez' admission Sala spoke to Cotroneo in Italian is much more probable, as I previously found.

On the evening of June 27, in the office of Kingstone-Hunt, Kingstone-Hunt told Sala: '''I have enough signatures.' So he says, 'I understand you have a few friends. Why don't you try to have them sign anyway?''' and Sala replied ''The people work under me''? The following day, Sala sought additional signatures on the Jimenez petition. Sala approached his son and told him; ''Son, sign the petition.'' His son's signature is the last on the Jimenez petition. He then spoke to two other employees, Di Sante and Bertolli, but they refused to sign the petition. He also spoke to his cousin, Giuseppe Sala, who refused to sign the petition. Sala also went to the home of Canino, who was not there, hence did not sign. Sala returned the petition at the end of the day on June 28.

Bertolli testified that on June 28, 1988, Mora approached him while he was working, informed him Sala wanted to see him. He was then approached by Sala and Erasmy to go to a room in the office area. Bertolli feared he was going to be fired. Sala and Bertolli did not socialize and there was no evidence that Bertolli understood the meeting to be a social gathering. Once in the room, the three supervisors closed the door indicating the meeting was ''confidential,'' and Sala said:

> The only reason we bring you over here, we want to know if you want to stay in the union or get out. I said, ''What are you talking about? I enjoy the union for 28 years.'' I said, ''I'd like to stay in the union if I can.'' And he [Sala] said, ''No, no, nobody will force you.''

Di Santi was admittedly approached by Sala while working and asked if he wanted to sign the petition to ''pull out of the union . . . yes or no.'' Di Santi replied no. Di Santi is Sala's brother-in-law. Sala then said ''I've got enough signatures to pull out of the union and we don't recognize the union no more.'' About 6 months later, Sala told him Kingstone-Hunt called Sala into the office and told him he had enough signatures to pull out of the Union but if Sala wanted, he could ask more employees if they wanted to sign the petition. I credit Di Sante's testimony. He appeared responsive and plausible. There was no indication of calumny or contrivance.

At noon on June 28, Kingstone-Hunt held an employees meeting where he informed the employees, according to Di Sante's unrefuted testimony, ''I've got enough signatures to pull out of the union and we don't recognize the union no more.''

According to Ferrari, whom I have previously found to be a credible witness, on or about June 30, a couple of days after an employee meeting concerning Respondents withdrawal of recognition from the Union, he asked Sala who was responsible for the petition; Sala said Jimenez. Ferrari then asked Sala why he signed and Sala replied: ''I was under a lot of pressure from Kingstone-Hunt, so I signed.'' Several weeks later Sala had a conversation with Ferrari and Castiglioni about his going to Canino's house with the petition. Ferrari told Sala he heard he took the petition to Redwood City to have Alberto sign it. Sala said that was correct, and Ferrari asked why. Sala replied: ''You know why. Tony Kingstone-Hunt told me to do it.''[26] Remo Castiglioni convincingly corroborated Ferrari's testimony. Castiglioni appeared straightforward in his testimony, he exhibited a candor bespeaking an effort to give full and honest responses to the questions.

b. *The Gonzalez petition*

Hector Gonzalez is the cousin of Serafin Mora and had worked at the cemetery about 1 year when he circulated the petition. According to Gonzalez, who was a section man at all times here pertinent, about 1 month after he was hired, sometime in April, 1988, Serafin Mora:[27]

> Well, he [Serafin Mora]—he just come around and ask me how I was doing and was everything going and that if I like those sections and things like that. And—and if I was happy doing what I was doing and I say, ''Yeah, I like—I like doing what I'm doing.''
>
> And, as I remember, he just mentioned it, that the Union doesn't like it this way, we might have to—if—if we lose, we might have to go back to the old system because that's when—when I found out that they had a—the Union was protesting the new plan.
>
> Q. And did he say what would happen to you if it went back to the old system?
>
> A. Well, I—he knew—then I said, ''What—what would happen to—to the new guys?'' And he said, ''They have to trim all day, eight hours a day.'' That was basically—basically what it was.

Gonzalez was hired after the New Operations Plan was implemented and never claimed he appreciated the differences in work with any particularity. On or about Friday

[26] Sala's denials concerning these conversations are not credited for the reasons previously stated.

[27] Mora did not refute Gonzalez' testimony, he did not even address it. I did not credit Gonzalez' testimony unless it was contrary to Respondent's interests because he did not answer questions openly and fully on cross-examination. He appeared to avoid any response he considered unfavorable to Respondent. For example, on direct examination he described Serafin Mora as a ''friend,'' only on cross-examination did he admit S. Mora was his cousin. Often, he had to be directed to reply to questions during cross-examination.

June 24, 1988, Gonzalez was at a pool hall with Serafin Mora, playing and conversing, when Serafin Mora said:

> Tony [Kingstone-Hunt] was upset for—'cause they had—they had lost the arbitration, the Union. And that we had to go back to the old system.
>
> And that when I said, ''What do you mean the old system?'' That's when—why—he said that how it was before, that we had to be trimming all—all day. I mean, trimming around the hedges.
>
> And then I—then I said, ''What about if we don't want to—want to do that? Can we do anything?'' And—and he said, ''Well, I don't know what everybody wants.''
>
> And then I said, ''If we decide to—not to be represented by the Union, can we still keep the same system?'' And he said, ''Well, if that's what you guys want, then we can do it.''[28]

During the weekend, Gonzalez talked with coworkers, Alfonso Juarez, Miguel Govea, and Eustacio Arvizu informing them Respondent lost the arbitration and the employees had to ''go back'' to the old system. He also talked to Junior Lopez during the weekend. These employees informed Gonzalez they would not like to return to the ''old'' system and indicated they would be willing to sign a petition. On Sunday, June 26, 1988, Gonzalez decided to prepare a petition and prior to work on June 27, he wrote a petition stating: ''We the following no longer wish to be represented by the Union Local 265. At Cypress Lawn Cemetery.'' He circulated the petition on June 27 and obtained 11 signatures, including his own. He gave his petition to Jimenez to hand over to Kingstone-Hunt. On the bottom of the petition Kingstone-Hunt noted it was received at 5:15 p.m. on June 27.

The first employee to sign the petition after Gonzalez, was Juarez, who signed after previously being told he would loose his job as a section man and be forced to spend all his worktime trimming hedges and gravestones. Next to sign was Garcia, to whom Gonzalez also related the threat of loss of the section man position as a result of not signing the petition. Garcia said he liked his current position and signed. The next signatory was Tom Kingstone-Hunt, Tony Kingstone-Hunt's son. Garcia told Tony Kingstone-Hunt:

> I ask him if he like to be a mechanic. He said, ''Yes.'' And—and that's when I—when I—I tell him that he might not be a mechanic much longer, if we go back to the old—the old system.
>
> And—and I said—well, that's—that's when—when he said he—he didn't want to go to trimming or—or working on the sections. Because, like, obviously, he didn't like to work outside on sections.
>
> I say, ''Well, if you—if you want to keep it the way it is, why don't you sign a petition?'' And then—then he says, ''Do you have it with you?'' And I says, ''Yes.'' Then I show it to him and he sign.

After lunch Gonzalez[29] sought out Govea, having already related the threatened loss of position to him over the weekend, and reminded him of that prior conversation and asked him to sign the petition. Next Gonzalez talked to Junior Lopez.[30] After the threatened loss of position was again discussed, Lopez agreed to sign the petition. Gonzalez then talked to Eustacio Arvizu, Ernesto Moreno and Pablo Gutierrez, who were working together that day. Gonzalez told them he was circulating a petition to ''pull out of the union'' and did they want to sign? They all replied in the affirmative and signed. After closer questioning, Gonzalez admitted he told them about the arbitration and they would be forced ''to go back to the old system.'' Arvizu indicated he did not want to return to the old system and thus wanted the get rid of the Union. A. similar conversation was held with Moreno and Gutierrez concerning their jobs and the Union.[31]

After Moreno, Gonzalez talked to Willie Mora who signed the petition when he came upon the crew in pursuance of his duties as assistant superintendent. Gonzalez said: ''And he knew, I assume he knew everything, that the cemetery had lost and everything. So I just ask him if he would sign. He said, 'Sure.''' Next, Gonzalez went to Andre Thompson and related the claim the arbitration decision would force employees to ''go back to the—old system'' if they did not get rid of the Union. Thompson, like Gutierrez, said he was not a member of the Union. Gonzalez told him he could still sign if he wanted to, he wanted his signature. Thompson's was the last signature on the Gonzalez petition.

Gonzalez denies Serafin Mora suggested he circulate a petition. He also denied he received any help in drafting the petition although he admitted he never previously prepared and circulated a petition. I note Serafin Mora made similar statements to Gonzalez and Jimenez concerning the impact of the arbitration decision and they assertedly reacted similarly. Jimenez at least admitted Respondent, by Kingstone-Hunt, suggested he circulate the petition. Gonzalez' testimony is not credible based solely on demeanor, as found above. I also find this disclaimer of help unbelievable. There was no predicate on which Gonzalez would have known of the petitioning process as a means of relieving the Respondent from compliance with the arbitration decision. In fact he testified he never signed or saw a petition before. Buttressing this conclusion is the testimony of Jimenez that Kingstone-Hunt told him Sunday evening he heard a rumor that Gon-

[28] On cross-examination Gonzales said Mora answered as follows:

> It's up to you guys. A majority of the—of the guys, if they like it the way it is.
>
> And—and that's when I—I said if we don't want to belong to—want the Union telling us what to do, what can we do.
>
> That's when he said, ''If you—you guys don't want to go back to the old system, then the majority decides.''

[29] Another inconsistency in Gonzalez' testimony is he initially claimed he talked to Govea after lunch and then testified he spoke to him during lunch.

[30] Similar to the other signatories, Gonzalez said:

> And—and he also knew what was going on with the—with the Union and the cemetery. And—and I used to ask him if he would like to—to go back and trim all day. And—and—and he also said that he didn't like to—to—to go back to the old system.

[31] Gonzalez related the following conversation with Gutierrez:

> I start telling him that the—the cemetery had to go back to the old system, because the Union was forcing them to go. And—and some of us didn't—didn't want to do that. And—because we wanted to keep the system we had at that time.
>
> And I had already some signatures to pull out of the Union and I asked him if he wanted to sign. . . . He said that he wasn't in the Union at that time. That he didn't—but I ask him if he was working there, that, if he wanted to sign, I like to have his signature. And he say, ''Well, if it—it counts, I'll sign.'' And he did.

zalez had ''already started a petition.'' Gonzalez testified he did not decide to prepare a petition until Sunday and did not prepare it until Monday morning. If S. Mora and Gonzalez did not discuss the petition process of decertifying a union, there was no predicate on which Kingstone-Hunt would have otherwise heard the rumor.

c. *Discussion*

(1) The alleged violations of Section 8(a)(1)

I find the evidence establishes Respondent's supervisors were involved in the initiation and circulation of the decertification petitions. Both Kingstone-Hunt and Mora are found to have initiated the circulation of the petitions by informing Jimenez and Gonzalez they would lose their jobs and be transferred to less desirable positions because the Union prevailed in the arbitration proceeding. Contrary to Respondent's representations, the Employer did not merely bring to the employees' attention their right to petition for decertification, the information was unsolicitedly imparted accompanied by threats of loss of position and reassignment to less desirable positions. This activity is consonant with Kingstone-Hunt's threats to the Union's representatives that if the Union won the arbitration: ''that he would go nonunion.'' I find this repeated threat supports my conclusion based on direct evidence that Respondent initiated and authorized the antiunion petitioning of Gonzalez, Jimenez, and the assistant superintendents.

Jimenez and Gonzalez were sought out by Kingstone-Hunt and Mora; they did not go to the office and declare dissatisfaction with the Union. There was no evidence the employees were displeased or dissatisfied with the Union as their collective-bargaining representative prior to Kingstone-Hunt's and S. Mora's inducements to Jimenez and Gonzalez to circulate the petitions. Jimenez testified he would never of circulated the petition if he had not been told his job as curator was at stake; if the Union was not decertified he would lose this position and have to go back outside and do gardening work. Similarly, Gonzalez, who was always a section man, was told he would lose that position and become a trimmer.

These announcements of unfavorable transfers of the employees was related by management's messengers, Gonzalez and Jimenez, to the great majority of the employees they solicited as the inducement for their signing the petitions. By sending Jimenez and Gonzalez to petition the employees on the basis of less favorable jobs as the result of the arbitration decision if the Union remained their collective-bargaining representative, Respondent clearly created a situation wherein the employees would ''tend to feel imperiled in maintaining Union membership.'' *Manhattan Hospital*, 280 NLRB 113, 115 (1986).

This is not a case where employees related their dissatisfaction with the Union and management merely advised the employees of their rights to decertify the Union. In the instant case, Respondent unsolicitedly provided a cause for disaffection with the Union and, only after telling Jimenez and Gonzalez they would be transferred to less desirable positions, did the Employer indicate they could only eliminate the peril to their jobs by petitioning to decertify the Union. I therefore conclude the petitions would not have been initiated save for the Employer's threats of transfers to less desirable jobs, which was unlawful solicitation to abandon the Union. *Weisser Optical Co.*, 274 NLRB 961 (1985); *Jax Mold & Machine*, 255 NLRB 942 (1981); *Hearst Corp.*, 281 NLRB 764 (1986); *Walker Mfg. Co.*, 288 NLRB 888 (1988).

These actions by Mora and Kingstone-Hunt were not alleged as separate violations of Section 8(a)(1) of the Act. However, I find they were closely related to the other allegations in the complaint, and the matter was fully and fairly tried. *C. P. Lesh Paper Co.*, 187 NLRB 359, 367 (1970). I conclude Respondent, like the Employer in *Federated Answering Service*, 288 NLRB 341 (1988), inveigled Jimenez and Gonzalez into actively promoting the signing of the decertification petitions, while trying to shield itself from the fatal taint of involvement by hiding behind the ''cloak'' of nonsupervisory employees, in violation of Section 8(a)(1) of the Act. *Technodent Corp.*, 294 NLRB 924 (1989); *Federated Answering Service*, supra. I also find the Respondent was not a disinterested neutral concerning the two decertification petitions and the resort to relating the threatened loss of positions and assignment of less favorable jobs were used as inducements to get most of the signatories to sign the petitions, renders the petitions ineffective to demonstrate loss of majority support. Having found this violation, I further find the Respondent's asserted good-faith doubt of the Union's continued majority was not raised in a context free of unfair labor practices of the type aimed at causing dissaffection from the Union. Therefore, the withdrawal of recognition, as well as the Respondent's later unilateral changes in employees' terms and conditions of employment, violated Section 8(a)(5) and (1) of the Act. *Texas Electric Coop*, 197 NLRB 10 (1972; *Craftool Mfg. Co.*, 229 NLRB 634 (1977); *Sacramento Clinical Laboratory*, 242 NLRB 944, 945 (1979); *Hohn Industries*, 283 NLRB 71 (1987); *Mega Van & Storage*, 294 NLRB 975 (1989).

Another basis for finding the petitions cannot be used to lawfully withdraw recognition from the Union is the credited evidence that Joe Sala, Cotroneo, and Bertolli were solicited to sign the decertification petitions by Jack Sala, a supervisor, with the connivance and assistance of Kingstone-Hunt, who gave him a copy of one of the petitions to get additional signatures. Respondent's responsibility for Sala's activities concerning the antiunion petition is governed by the test of *Montgomery Ward & Co.*, 115 NLRB 645 (1956):

> Statements made by such a [Assistant Superintendent which is also a bargaining unit member] supervisor are not considered by employees to be representations of management, but of a fellow employee. Thus they do not tend to intimidate employees. For that reason, the Board has generally refused to hold an employer responsible for the antiunion conduct of a supervisor included in the unit, in the absence of evidence that the employer encouraged, authorized, or ratified the supervisor's activities or acted in such manner as to lead employees reasonably to believe that the supervisor was acting for and on behalf of management.

As noted by Administrative Law Judge Anderson in *Times-Herald, Inc.*, 253 NLRB 524, 528 (1980):

> The General Counsel established a prima facie violation of Section 8(a)(1) of the Act when it proved that a supervisor in Respondent's employ solicited employee

> support for a union decertification petition. Respondent, however, has established, by way of an affirmative defense, that the supervisor was also a unit member. . . . Montgomery Ward and its progeny[8] establish a burden on the General Counsel in such circumstances to produce evidence either: (1) of Respondent's encouragement, authorization, or ratification of the conduct . . . or (2) of conduct which might lead employees reasonably to believe that the supervisor was acting for and on behalf of management.

[8] E.g., *Nassau and Suffolk Contractors' Association, Inc.*, 118 NLRB 174 (1957); *Dayton Blueprint Company, Inc.*, 193 NLRB 1100 (1971); *C. Markus Hardware, Inc.*, 243 NLRB 903 (1979); *Breckenridge Gasoline Co.*, 127 NLRB 1462 (1960).

Here, I find Respondent by Kingstone-Hunt encouraged, authorized and ratified Sala'a actions by making a copy of a petition available to him and encouraging his action of asking employees to sign the antiunion petition. Also the assistant superintendents engaged in conduct which lead employees to believe they were acting on behalf of management. For example, Erasmy drove Cotroneo to the office and Erasmy and Sala again requested Cotroneo to sign the petition in an office next door to Kingstone-Hunt's office, and after Cotroneo signed, Sala took the petition into Kingstone-Hunt. Sala admitted to several employees he was acting pursuant to the directions of Kingstone-Hunt. Bertolli was at his work site when all three assistant superintendents conducted him to an office where they closed the door and asked him to sign the petition. The fact these employees were conducted to the office area at the request of supervisors and asked to sign an antiunion petition reasonably tended to coerce under the circumstances for there was no reason such solicitation of their signatures could not have occurred at their work stations.

These were not innocuous conversations. The context of the conversations and the settings conveyed the intent that Respondent was using its leverage as the Employer to influence employees on a question of union representation, in violation of Section 8(a)(1) of the Act. This conduct also indicated to the employees the assistant superintendents[32] were acting on behelf of the employer considering the solicitations of Bertolli and Cotroneo occurred in the office area, and Bertolli was called away from work by all three assistant superintendents. *Choctawhatchee Electric Cooperative*, 274 NLRB 595 (1985); *Browning-Ferris Industries*, 275 NLRB 71 (1985). In this case, the employees had a clear indication the assistant superintendents were acting on behalf of management.

Sala admitted telling Di Santi that Kingstone-Hunt sent him with the petition at the time he solicited his signature. As found above, Sala told other employees Kingstone-Hunt pressured him into soliciting signatures on the decertification petition.[33] This credited testimony is a further basis to find management sponsorship and participation in the petition process. Further giving the stamp of employer imprimatur was the solicitation by the assistant superintendents and employees during working time. There was no evidence solicitations during worktime was tolerated by Respondent in any other circumstance. This was another indication the employer was responsible for the actions of the supervisors, Jimenez and Gonzalez. Both Gonzalez and Jimenez understood Respondent's involvement as evidenced by their turning the petitions in to Kingstone-Hunt to deliver to the Union. *Lomansney Combustion*, 273 NLRB 1241 (1984).

In fact, Cotroneo specifically requested earlier the opportunity to consult his wife about the petition before signing it when approached by Sala in the more comfortable surroundings of his worksite. His request was not honored, he was later taken to the office area and pressured into signing the petition. This violation further irrevocably taints the decertification petition process. Bertolli was not informed of the nature of the request to accompany three supervisors to the office. Sala also queried Di Santi and Joe Sala to determine if they would sign the petition. Sala admitted to ordering his son to sign the petition. This approach to his solicitation of signatures further indicates the coercive nature of his efforts.

In sum I find Respondent encouraged, initiated, authorized, and ratified Sala's solicitation efforts and, at the least, ratified the solicitation efforts of Sala, Mora, and Erasmy, in violation of Section 8(a)(1) of the Act. I also find the signatories to the decertification petitions did not have the requisite complete and unfettered freedom of choice. Therefore, I conclude the petitions are not reliable indicators of the employees' true sentiments. *NLRB v. Link Belt Co.*, 311 U.S. 584 (1941).

(2) Respondent's withdrawal of recognition

On June 28, 1989, the day after Gonzalez, Jimenez, and the assistant superintendents initially gave Kingstone-Hunt the decertification petitions, Kingstone-Hunt sent the Union a letter and telegram withdrawing recognition to the Union as Respondent's collective-bargaining representative. Respondent contends the unit has about 34 employees according to its payroll register and the petitions had 20 signatures.[34] Thus it claims ''the overwhelming majority of the employees of Cypress Lawns in the present bargaining unit have stated their desire to no longer be represented by Local 265.''

[32] Sala readily admitted his involvement in soliciting signatures for the petitions. Mora did not testify and since he is a supervisor I presume if he had testified he would not have contradicted the employees' accounts of his involvement in the solicitation of signatures. *International Automated Machines*, 285 NLRB 1122 (1987).

[33] While Sala informed some employees he solicited they had the right to refrain from signing the petition, Respondent, by Sala and other supervisors, as previously indicated, created a situation where employees would tend to feel peril in refraining from signing the petition. *Aircraft Hydro-Forming*, 221 NLRB 581, 583 (1975). Moreover, other employees were not afforded this choice as previously discussed in relating the solicitations of Sala's son and Controneo.

[34] General Counsel notes that at the time the telegram was sent, 7:22 e.s.t., Joe Sala may not have signed the petition his father was circulating. General Counsel also argues that the unit is comprised of 25 employees, 4 supervisors and temporary employees hired only for the summer should not be included. Analogously, General Counsel argues that when the ineligible employees' signatures are subtracted from the count of petition signatories, claiming there were seven ineligible, there was not a majority. Based on my findings the petition process was tainted by management's involvement, including the activities of the assistant superintendents, it is not necessary to reach the question of whether a majority of unit members signed the petitions prior to Respondent's withdrawal of recognition. However, to ensure completeness, based on the entire record, I find Respondent has failed to establish a majority of the eligible employees signed the petitions. For example, supervisors, part-time and/or temporary employees, who were not shown to be included in the unit, signed the petitions.

When a collective-bargaining agreement expires, the incumbent union is presumed to continue as the collective-bargaining representative of the majority of the employees in the bargaining unit. See *Club Cal-Neva*, 231 NLRB 22 (1977); *Guerdon Industries*, 218 NLRB 658, 659 (1975); *Barrington Plaza & Tragniew*, 185 NLRB 962 (1970), enf. denied on other grounds 470 F.2d 669 (9th Cir. 1972). This presumption may be rebutted by evidence that the union lost its majority status or by evidence presented by the employer of a good-faith doubt of the union's majority status based on objective considerations supporting that doubt. *Terrell Machine Co. v. NLRB*, 427 F.2d 1088 (4th Cir. 1970), enfg. 173 NLRB 1480 (1969); *Guerdon Industries*, supra. When a reasonable founded good-faith doubt is claimed, such doubt must be raised in a context free of unfair labor practices. *Nu-Southern Dyeing & Finishing*, 179 NLRB 573 (1969), enf. denied in part 444 F.2d 11 (4th Cir. 1971). I conclude, based on the record as a whole, there was no legitimate basis for Respondent's claimed good-faith doubt of the Union's majority status. At all times material, the Union's presumed majority continued. *Celanese Corp. of America*, 95 NLRB 664 (1951).

In this case the Union sub judice was entitled to a presumption of majority status based on the contract which expired March 1, 1988. Having found the petition was not raised in a context free of unfair labor practices, it cannot be used as a basis to claim good-faith doubt of majority status. I have assessed the overall impact of the violations Respondent has committed concerning the decertification petitions and conclude they cannot be considered as legitimate objective considerations of a good-faith doubt of the Union's majority status. *Choctawatchee Electric Cooperative*, supra at 601. I also find the unlawful unilateral implementation of the New Operations Plan, standing alone, would so taint the petitioning process as to render the withdrawal of recognition unlawful. I find Respondent's reliance on the petitions as objective basis for a good-faith doubt of the Union's majority status misplaced and its refusal to bargain under these circumstances was a violation of Section 8(a)(5) and (1) of the Act. *Idaho Fresh Pak-Inc.*, 215 NLRB 676, 679 (1974); *Cantor Bros.*, 203 NLRB 774 fn. 4 (1973).

(3) Unilateral changes after withdrawal of recognition

Respondent admitted upon withdrawing recognition from the Union, on June 30, 1988, it unilaterally and without prior notice to or bargaining with the Union, implemented new terms and conditions of employment including, inter alia, continuation of the New Operations Plan changes such as alterations in hours of work, premium pay/overtime, grievance procedure, sick leave, wages, performance bonuses, establishing life insurance in the amount of $50,000, disability insurance, dental insurance, pension, safety committee, and a health program. Also included in these acknowledged unilateral changes is the admission Respondent failed to maintain a dental benefit plan and/or to make contributions to the health and welfare and pension trust plans mandated in the expired collective-bargaining agreement. By memorandum to all personnel dated June 30, 1988, Respondent informed the employees of the above listed changes, plus changing the grievance procedure, granting a cost-of-living allowance and base pay adjustment, establishing individual performance bonus, changing the sick leave accumulation policy, granting education leaves, tuition payments, and cash awards for suggestions.

As the Board found in *United Technologies Corp.*, 296 NLRB 571 (1989):

> In determining whether a party has bargained in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place. *Hotel Roanoke*, 289 NLRB No. 16, slip op. at 7 (Mar. 15, 1989); *Port Plastics*, 279 NLRB 362, 382 (1986); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). The Board examines not only the parties' behavior at the bargaining table, but also conduct away from the table that may affect the negotiations. *Hotel Roanoke*, above; *Port Plastics*, above. Among other indicia that a party has bargained in bad faith, the Board also considers whether a party has engaged in delaying tactics and whether a party has made unilateral changes in mandatory subjects of bargaining. *Atlanta Hilton & Tower*, above.

It is undisputed that retention of the health and welfare trust benefit plan and payments to that and the other contractual funds, as provided in the expired collective-bargaining agreement, are mandatory subjects of bargaining, as are the other admitted and otherwise determined unilateral changes to the employees terms and conditions of employment. *Scott Lee Guttering Co.*, 295 NLRB 424 (1989). There were no exigencies demonstrated that would excuse Respondent from its bargaining obligation.

Respondent infers changes in the operation occasioned by the Cemetery reaching maximum capacity in the near future is a sufficient economic justification for its unilateral changes. I find the bare claim of compelling economic considerations unpersuasive. There were no financial data adduced to demonstrate the existence of compelling economic considerations. The cost of the New Operations Plan and other unilateral changes are not in evidence.

As the Board stated in *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982), modified 736 F.2d 343 (6th Cir. 1984):

> The Board has repeatedly held that economic expediency or sound business considerations are insufficient defenses to justify unilateral changes in terms and conditions of employment. Once the General Counsel has made a *prima facie* showing of an 8(a)(5) violation—as has been done here—a respondent must demonstrate why the refusal to bargain was privileged. In the instant case, Respondent was responsible for showing that ''compelling economic considerations'' warranted its acting unilaterally. This has not been done here.

After considering the foregoing and the entire record, I find no legitimate basis for Respondent's claimed good faith belief the Union lacked majority status. The Union's presumed majority status continued at all material times. Therefore, Respondent was not entitled to change the terms and conditions of employment for bargaining unit employees without notice to, and bargaining with, the Union. Admittedly, Respondent did neither before it changed the above stated terms and conditions of employment after June 28, 1988. I find these terms and conditions of employment are

mandatory subjects of bargaining. Accordingly, I find Respondent's failure to give the Union notice and an opportunity to bargain about these changes violated Section 8(a)(5) and (1) of the Act. *Storer Communications*, 297 NLRB 296 (1989).

CONCLUSIONS OF LAW

1.Respondent Cypress Lawn Cemetery Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Cemetery and Greens Attendants Union Local 265 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been the exclusive collective-bargaining representative within the meaning of Section 9(b) of the Act for the following appropriate unit:

> All employees covered under the terms of the March 1, 1985 to February 29, 1988, collective-bargaining agreement between Associated Cemeteries and the Union.

4. At all times material, the Union has been the exclusive collective-bargaining representative of all the employees in the unit found appropriate in Conclusion of Law 3 for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By urging, encouraging, and soliciting its employees to file a petition to decertify the Union, coercively soliciting employees' signatures, including the threat of less favorable working conditions if the employees failed to sign the petitions, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. By unilaterally instituting and implementing the New Operations Plan, which changed terms and conditions of employment in the above described unit, Respondent, without notice to or consultation with the Union, violated Section 8(a)(5) and (1) of the Act.

7. By withdrawing and withholding recognition of the Union as the exclusive representative of its employees in the above specified unit, the Respondent has refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

8. By making numerous unilateral changes in terms and conditions of employment in the above-described unit after the unlawful withdrawal of recognition, without notice to or consultation with the Union, including failure to maintain a dental benefit plan, failure to contribute to Union health and welfare plans, failure to contribute to the Union's pension trust, establishing a safety committee, changing the grievance procedure, granting a cost-of-living allowance and base pay adjustment, establishing individual performance bonus, changing the sick leave accumulation policy, establishing for each employee life insurance in the amount of $50,000, granting education leaves, tuition payments and cash awards for suggestions, without notice or consultation with the Union, Respondent has refused to bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

9. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and take certain affirmative action designed to effectuate the policies of the Act.

Having found Respondent has refused to meet and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act, it will be ordered to cease and desist therefrom and, on request, to bargain collectively in good faith with the Union as the exclusive representative of all of the employees in the appropriate unit, and in the event an understanding is reached, to embody such understanding in a signed agreement. See *Winn-Dixie Stores*, 243 NLRB 972 (1979); *Alsey Refractories Co.* 215 NLRB 785 (1974). In addition, Respondent should maintain in effect the terms and conditions of employment specified in the now expired collective-bargaining agreement unless and until the Respondent and the Union agree otherwise, or until the parties bargain to a legitimate impasse. Respondent, having in 1986 implemented the New Operations Plan without notifying the Union and affording the Union an opportunity to bargain concerning the decision and its effects, shall, upon request by the Union, restore the status quo ante as it existed prior to the implementation of the plan.

To the extent Respondent has changed the terms and conditions of employment in effect under the old agreement to the economic detriment of employees, the Respondent is required to make whole the employees for any losses they suffered as a consequence of its unlawful unilateral changes and withdrawal of recognition.[35] The Respondent shall also be required to make whole any trust funds provided for under the expired collective-bargaining agreement, which would have been paid absent Respondent's refusal to apply the terms of the agreement to its employees and unilaterally discontinue these payments,[36] and to post the atached notice. In the event any backpay is due, the computation of backpay shall be in the manner provided by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), together with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), except that any interest accrued prior to January 1, 1987, shall be computed in the manner prescribed in *Florida Steel Corp.*, 231 NLRB 651 (1977).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

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[35] Nothing should be construed to require Respondent to alter any economic benefits granted to employees since the implementation of the New Operations Plan on or about September 2, 1986, in the absence of a request by the Union, Respondent make such a restoration of benefit.

[36] The provisions of employee benefit fund agreements are variable and complex, accordingly, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a proscribed rate on unlawfully held fund payments. The Board leaves to the compliance stage the question of whether Respondent must pay any additional amounts into the funds in order to satisfy this ''make-whole'' remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding by Respondent, found herein, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc., but not collateral losses. *Fox Painting Co.*, 263 NLRB 437 (1982); *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as

Continued

ORDER

The Respondent, Cypress Lawn Cemetery Association, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Urging, encouraging, and soliciting its employees to file a petition to decertify the Union, coercively soliciting employees' signatures, including the threat of less favorable working conditions if the employees failed to sign the petitions, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

(b) Withdrawing recognition from, or refusing to bargain collectively with Cemetery and Greens Attendants Union Local 265, affiliated with Service Employees International Union, AFL–CIO as the exclusive representative of all the employees in a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act, composed of:

> All employees covered under the terms of the March 1, 1985 to February 29, 1988, collective-bargaining agreement between Associated Cemeteries and the Union.

(c) Changing unilaterally terms and conditions of employment without first affording the Union the opportunity to bargain over the proposed changes, including: implementation of the New Operations Plan, failure to maintain a dental benefit plan, failure to contribute to the Union's health and welfare plans, failure to contribute to the Union's pension trust, establishing a safety committee, changing the grievance procedure, granting a cost-of-living allowance and base pay adjustment, establishing individual performance bonus, changing the sick leave accumulation policy, establishing for each employee life insurance in the amount of $50,000, granting education leaves, tuition payments and cash awards for suggestions, without notice to or consultation with the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and bargain with the Union as the exclusive representative of the employees in the unit described above; and upon request, restore the status quo ante before the implementation of the New Operations Plan in 1986.

(b) Make the employees in the unit described above whole for any losses they may have suffered as a consequence of the Respondent's unlawful unilateral changes to their terms and conditions of employment and withdrawal and withholding recognition of the Union, as their exclusive collective-bargaining representative in the manner specified in the section above entitled ''The Remedy.''

(c) Preserve and, on request, make available to the Board or its agent, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or appropriate to analyze the amount of money due under the terms of this Order.

(d) Post at facility and place of business in Colma, California, copies of the attached notice marked ''Appendix.''[38] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director within 20 days from the date of this Order what steps the Respondent has taken to comply.

provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''